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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

BY RICHARD W. GILL,

CLERK OF THE COURT OF APPEALS.

COMPLETED BY OLIVER MILLER, Esq.,

OF THE ANNAPOLIS BAR

VOL. IX.
CONTAINING CASES IN 1850. & 1851.

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NAMES OF THE JUDGES, &c.,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

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Hon. E. F. CHAMBERS, Judge.
Hon. ARA SPENCE, Judge.
Hon. ALEXANDER C. MAGRUDER, Judge.
Hon. ROBERT N. MARTIN, Judge.
Hon. WILLIAM FRICK, Judge.

OF THE COURT OF CHANCERY.

Hon. JOHN JOHNSON, Chancellor.

OF THE COUNTY COURTS.

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Hon. EDMUND KEY, Associate Judge.
Hon. P. W. CRAIN, Do.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne and Talbot* Counties.

Hon. E. F. CHAMBERS, Chief Judge.
Hon. PHILEMON B. HOPPER, Associate Judge.
Hon. JOHN B. ECCLESTON, Do.

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel, Montgomery and Carroll* Counties, and *Howard* District.

Hon. THOMAS BEALE DORSEY, Chief Judge.
Hon. THOMAS H. WILKINSON, Associate Judge.
Hon. NICHOLAS BREWER, Do.

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FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset and Worcester* Counties.

Hon. ARA SPENCE, Chief Judge.

Hon. WILLIAM TINGLE, Associate Judge.

Hon. BRICE J. GOLDSBOROUGH, Do.

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Hon. JOHN PURVIANCE, Associate Judge.

Hon. JOHN C. LE GRAND, Do.

OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.

Hon. ALEXANDER NISBET, Associate Judge.

Hon. W. G. D. WORTHINGTON, Do.

ATTORNEY GENERAL.

GEORGE R. RICHARDSON, Esquire.

ROBERT J. BRENT, appointed 12th of February 1851, *vice* GEORGE R. RICHARDSON, deceased.

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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

JUNE TERM, 1850.

SAMUEL D. DAKIN vs. THEODORE POMEROY AND WILLIAM
CRAFTS.

A covenant for the quiet enjoyment of lands, cannot be assigned under the act of 1829, ch. 51, so as to authorise the assignee to sue for a breach of it. That act authorises the assignments of judgments, bonds, specialties, or other *choses in action* for the *payment of money*, and not stipulations to do or not to do some act or duty.

The assignment of such a covenant made in respect to lands in *New York* cannot be used as a set off in *Maryland*.

Such a covenant cannot well be separated from the deed of which it is a part, and an assignment of it to a person who had no interest in the land, will not entitle the assignee to institute suit upon it in his own name, or to use such assignment as a set off.

Where a contract is made in another State, questions arising upon it in this State, must, in the absence of legal proof of what the law of such other State is, be decided by the law of *Maryland*.

The *lex loci* determines the nature, construction and validity of foreign contracts, but the *lex fori* is to be resorted to in order to ascertain the remedy which is to be used.

Where a party is not injured by an instruction, he cannot on appeal ask a reversal of the judgment on account of its being granted, even though there may be error in it.

Dakin vs. Pomeroy and Crafts.—1850.

APPEAL from *Baltimore* county court.

This was an action of *debt*, brought by the appellees against the appellant, upon a judgment recovered by them against the latter, in the *Supreme Court of Judicature* of the State of *New York*, in *Oneida* county of said State, on the 12th of October, 1839, for \$6,017.02, and costs.

The pleas were:—1st. *Nul tiel record*. 2nd. Payment. 3rd. That the plaintiffs made a certain covenant of quiet enjoyment with one *Demerritt*, in respect to certain lands in *New York*, from which the said covenantee was evicted by a certain *Rogers* under a prior mortgage, and the said *Demerritt* assigned to defendant, under hand and seal, all his rights, &c., in said covenant, and all damages thereby.

4th plea sets forth same covenant as third plea, and an assignment of *Demerritt's* title to the defendant, of, in and to, a large portion of the estate deeded by plaintiffs to said *Demerritt*, to wit: in *thirty* lots, and that defendant possessed them, but was evicted as assignee of *Demerritt* by *Rogers*, under a prior mortgage, and the defendant claims as such assignee to offset \$6,000, which he avers is a just proportion of the consideration money stated in said deed to *Demerritt*.

5th plea sets forth same facts, only stating *Demerritt* to have been in possession at date of deed to him, and that afterwards, the possession being peaceably obtained by *Rogers*, who had lawful right, &c., the said *Demerritt* was kept out of possession, and the covenant broken with *Demerritt*, who afterwards assigned to defendant all his rights.

Issues were joined on first and second pleas, and the plaintiffs replied to the third, that the mortgage set forth therein was satisfied, and did not come by assignment to *Rogers*, who did not evict the defendant, and did not enter, &c. To the fourth, by traversing the title of defendant to the thirty lots and his eviction. Issues were then joined on the traverses to the third and fourth pleas. After various imparlances, the plaintiffs demurred specially to the fifth plea, because the amount thereby claimed as a set off, was not stated, and this demurrer the court sustained. The defendant then gave a notice of set off.

Dakin vs. Pomeroy and Crafts.—1850.

EXCEPTION. The plaintiffs offered the judgment upon which the suit was brought, and agreed, that there was due on it at the date of its rendition, only the sum of \$3,111.54, with interest from the 18th of October, 1839. The defendant then offered:—1st. A deed from the plaintiffs and their respective wives, dated 8th of October, 1836, conveying certain lands in the State of *New York* to *Demerritt*, for the consideration of \$8,000, and containing a covenant for quiet enjoyment by the *grantee and his assigns* of the granted premises, but no reference to any mortgage or incumbrance on the property. 2nd. A deed from *Henry Rogers*, dated 6th of April, 1836, conveying the same land to the plaintiffs for \$4,003.25, which recites a mortgage on the property previously given by *Justin Cooley*, for \$800, to the *New York Life Insurance and Trust Company*. 3rd. A deed from *Cooley*, dated 13th of January, 1836, conveying the same land to *Rogers* for \$5,900, subject to the same mortgage mentioned in the second deed. 4th. The mortgage above referred to from *Cooley* to the *New York Life Insurance and Trust Company*, dated 10th of September, 1830, to secure the sum of \$800, payable in one year from date. 5th. An assignment of said mortgage by said *company* to said *Rogers*, for \$800, dated in August 1841. These deeds were all executed and recorded in the State of *New York*. The defendant further read in evidence the statutes of *New York* relative to the foreclosure of mortgages, and then the proceedings to foreclose said mortgage, showing an eviction by said *Rogers*, as assignee thereof, by purchasing the same at public sale on the 10th of February, 1842; and also read in evidence, without objection, to show the measure of damages for the breach of the covenant for quiet possession in *New York*, the law as laid down in 4 *Kent's Commentaries*, 468 and 469, inclusive, (5th edition,) and the cases therein cited. Also the testimony of said *Rogers* taken under a commission, in reference to his purchase of the mortgage and land, which it is unnecessary to state, and the following assignment:

“For value received, I hereby assign, transfer and make over to *Samuel D. Dakin*, of *New York*, all my right, title

Dakin vs. Pomeroy and Crafts.—1850.

and interest, of, in and to the covenant of *Theodore Pomeroy* and *William Crafts*, contained in a deed of conveyance executed and delivered to me by the said *Pomeroy* and his wife, *Cornelia*, and by the said *Crafts* and his wife, *Jane A.*, dated the 8th day of October, 1836, by which covenant the said *Pomeroy* and *Crafts* warranted and defended me, my heirs and assigns, in the quiet and peaceable possession of the premises and every part thereof described in this said deed, against all and every person or persons lawfully claiming, or to claim the whole or any part thereof, and I authorise the said *Dakin* to recover in his own name, by suit, set off or otherwise, all such damages as have accrued or may accrue by breach of said covenant. Witness this 23rd day of January, A. D., 1845.

A. C. DEMERRITT, (Seal.)”

“Witness:—*Robert J. Brent.*”

The plaintiffs thereupon conceding, that defendant was entitled to a set off, as assignee of said *Demerritt*, to the same extent that said *Demerritt* would be if he were the defendant, prayed the court to instruct the jury, that the defendant was entitled to set off in this action, that amount only which at the time of the sale was due upon the mortgage to the *Life and Trust Company* aforesaid, with interest, which direction the court, (ARCHER, C. J.,) refused to give; but instructed the jury, that the true rule of damages in this case was the value of the land at the time of the purchase by *Rogers*, under the statutory foreclosure named in the evidence, and that the defendant was only entitled to set off the amount of that value. To which instruction of the court the defendant excepted. The verdict on all the four issues was for the plaintiffs, and judgment was entered, to be released on payment of \$3,065, with interest from 9th of May, 1848, and costs. The defendant appealed.

The case was tried below before ARCHER, C. J., but the exception was not prepared for signature until after his death, when, by written consent of the counsel for the respective parties, it was signed by *Judge Le Grand*.

Dakin vs. Pomeroy and Crafts.—1850.

The cause was argued before SPENCE, MAGRUDER, MARTIN, and FRICK, J.

WM. M. ADDISON and R. J. BRENT, for the appellant, insisted, that the *New York* law is to govern the measure of damages on this *New York* contract, and by the proof of the law, he is entitled to set off the whole debt, as the consideration in the deed to *Demerritt*, being \$8,000, was the only legal measure of damages.

MAYER, for the appellee, contended :

1st. The standard of damage fixed by the county court, was even more beneficial than that to which the appellant was entitled, and more was accorded by the instruction, than the state and extent of the testimony allowed to him upon the set off.

2nd. The *New York* law is not established by any testimony for regulating the damages in this case; and in the absence of due evidence of that law, the *Maryland* law must rule. If even proved, the *New York* law could not govern here on this point of damages.

3rd. The point that the *New York* law should be followed in this particular, is not open to the appellant under the exception taken.

MAGRUDER, J., delivered the opinion of this court.

This suit was instituted in *Baltimore* county court, by the appellees, and there is no controversy in regard to their right of action or the amount due thereon.

The defendant below claimed a right to set off a demand, founded on a conveyance of land by the plaintiffs to one *Demerritt*. This conveyance contains a covenant for quiet enjoyment of the premises. It is alleged, that the same was broken, and subsequently assigned to the defendant by *Demerritt*. If this claim cannot, according to the laws of *Maryland*, be set off, then the defendant cannot complain of any error in regard thereto, which may be found in the instruction of the court.

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But for our act of Assembly, 1829, ch. 51, it certainly could not be said, that such an assignment as the one now relied on, could be used in *Maryland*, by way of offset against the demand of the plaintiff. According, however, to the opinions of this court, expressed in *Gordon vs. Downey*, 1 *Gill*, 41, and *Cranfurd against Brooke*, 4 *Gill*, the act of 1829 does not embrace such an assignment as this. The assignee must be entitled “to a judgment, bond or specialty, or other *chose in action*, for the *payment of money*.” It cannot be a stipulation to do or omit to do some act or duty.

The covenant, which is made the foundation of this demand, cannot well be separated from the deed of which it is a part, and by an assignment of it to a person who had no interest in the land, he cannot be entitled to institute a suit upon it in his own name. If he cannot institute such a suit, it cannot be an offset against the claim of the plaintiff in this suit. We think the defendant below had no right of set off.

This opinion renders unnecessary a decision of the question which was supposed to arise upon the exception. The court seem to have taken a decision of the facts from the jury. But by the instruction which was given, the defendant below was very far from being injured.

The covenant here relied on by the defendant below, the breach and subsequent assignment, is a *New York* transaction, and it is insisted, that most of the questions are to be determined by the law of *New York*.

It is true that we claim a right to use, (and perhaps use too freely,) the decisions of our sister States, by way of illustration or argument, but it ought to be remembered, that when the question to be decided by us is, what is the law of another State? we must be furnished with legal proof, and in the absence of such proof, the question must necessarily be decided by the law of *Maryland*.

In regard to this suit, it may be observed, that although the *lex loci* determines the nature, construction and validity of foreign contracts, the *lex fori* is to be resorted to, in order to ascertain the remedy which is to be used. The inquiry is not,

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whether in a case like this, and depending in a *Maryland* court, such a claim as that of the defendant below can, according to the laws of *New York*, be set off against the plaintiff's demand. It is not necessary then to enquire, why the words "conceding that the plaintiff was entitled to a set off, as assignee of said *Demerritt*, to the same extent that the said *Demerritt* would be if he was the defendant," were introduced into the plaintiff's prayer, as the question of the right of the defendant must be determined by the law of *Maryland*, and cannot depend upon any concession or admissions by the parties of what our law is.

JUDGMENT AFFIRMED.

WILLIAM HARKER, B. M. CAMPBELL AND JOHN CAMPBELL,
vs. JOHN E. DEMENT.—June 1850.

The defendant in an action of trover, cannot prove that the title to the property in dispute was not in the plaintiff, but was at the time of the conversion outstanding in a third party, with whom defendant had no connection or privity, either to defeat the action or in mitigation of damages.

A defendant in trover cannot set up property in a third person, without showing some title, claim or interest in himself, derived from such person. In an action of trespass or trover by a termor against his reversioner, for an unauthorized interruption of his possession during the term, the measure of damages is the actual loss sustained by the lessee.

But in such an action against a stranger and wrong doer, the termor is treated as the absolute owner of the property, and he is entitled to recover its full value.

The termor being bound to restore the property to the person from whom he obtained it, or to stand responsible in damages for its full value, has the right to recover its full value from a stranger, who has wrongfully deprived him of it.

Upon the ground of ulterior responsibility, the borrower of a chattel may maintain an action of trespass or trover against a wrong doer, who has

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violated his possession, and recover the full value of the property of which he was dispossessed.

A pawnee of goods may maintain trespass against a stranger, who takes them away and recover their whole value in damages, though they were pledged to him for less, because he is answerable for the excess to the owner.

There is no analogy between the case of a termor suing for property wrongfully taken from his possession, and that of a tenant in common, or part owner of a chattel suing for his proportionate share or interest. The latter, unless a plea in abatement is interposed, may recover in trover or trespass his aliquot share, but he is under no ulterior responsibility to his co-tenant.

If a defendant in trover or trespass fails to plead in abatement to the suit of one tenant in common, to recover his interest in the chattel, he is precluded from interposing such a plea to a second suit, by another such tenant for his share.

The declarations of a person exercising authority that he possesses it, can never be received as evidence of the fact of his authority.

Conversion is the wrongful asportation of a chattel with the intent to appropriate it to the taker's use, and when such asportation and intent are proved, the conversion is established, no matter under what impression the taker may have acted.

The motive by which a defendant was influenced in converting to his own use the property of another, is only admissible when introduced to repel an attempt by the plaintiff to recover from him, in an action of trover, exemplary damages.

The establishment of the fact, that the defendant thought himself the *bona fide* purchaser of the slaves, and under this belief acted in good faith in seizing and taking them from the plaintiff, would not impose upon the latter the necessity of proving a demand and refusal.

Parol proof of what occurred at the trial of a cause between certain parties, is not admissible, unless preceded by the production of the record of the case to which such testimony referred.

APPEAL from *Baltimore* county court.

This was an action of *trover*, instituted by the appellee against the appellants, on the 24th of April 1846, to recover the value of two negro slaves, *Wood* and *Henry*, mentioned in the declaration. Plea, *not guilty*.

1ST EXCEPTION. The plaintiff proved by *Goodrick*, that in March 1846, plaintiff was in possession of a farm and negroes in *Charles* county, which were under the management of witness, as his overseer; that on the 13th March, 1846, *John*

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Campbell, one of the defendants, came to this farm, (in the absence of the plaintiff,) accompanied by *Mr. Edmund Briscoe* and the sheriff of *Charles* county; that *Briscoe* then and there bargained with *Campbell* for the sale of the negroes, *Wood* and *Henry*, in suit, then on said farm, in possession of the plaintiff; that no money was then paid, but *Campbell* handcuffed the negroes and carried them away. The defendants' counsel then, on cross-examination, asked witness whether said negroes were not the property of *Richard Dement's* estate, and avowed his purpose to be to give such evidence to defeat plaintiff's claim, or to offer the same in mitigation of damages. But the court, (ARCHER, C. J., and LE GRAND, A. J.,) refused to allow such evidence to be given for either of such purposes, unless the defendants proposed to follow it up, with evidence that they acted under authority derived from the representatives of *Dement's* estate, which offer defendants' counsel declined. To which opinion of the court the defendants excepted.

2ND EXCEPTION. The defendants then asked said witness, on cross-examination, to state all the conversation which occurred at the time of taking said property, and whether *Mr. Briscoe* did not then state that he came and took said negroes by the authority of the plaintiff, for the purpose of paying a debt of plaintiff, for which he, the defendant, was security. This was offered as part of the transaction, it having taken place at the time of the taking. To the admissibility of which the plaintiff objected. The court sustained the objection, and defendants excepted.

3RD EXCEPTION. The defendants then called *Robert J. Brent* as a witness, and asked him if he was present at the trial in *Charles* county court, between *Edmund Briscoe*, the owner of said negroes, and the plaintiff in this case, in which the counsel of *Dement*, without pleading it, set up orally, as a defence or set off to plaintiff's claim, the sale of the negroes in question by *Briscoe*, and the receipt of the purchase money by him; and whether the same was not submitted to the jury, in the argument by plaintiff's and defendants' counsel. To this question plaintiff objected, and the court sustained the ob-

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jection, and refused to let any part of such question be put, unless it was preceded by record evidence of the existence of a suit in *Charles* county court, wherein *Briscoe* was plaintiff, and the plaintiff in this action was defendant. The defendants excepted.

The jury rendered a verdict for the plaintiff, and assessed the damages at \$1,189.89. The defendants then moved for a new trial:—1st. Because the damages are excessive. 2nd. Because of newly discovered testimony. And 3rd. Because of surprise and mistake. The plaintiff released \$210.50, part of the damages, and the court overruled the motion for a new trial, and gave judgment for the plaintiff for the sum of \$970.39, and costs. The defendant appealed.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

RICHARDSON, attorney general, for the appellants, contended that the court erred in rejecting the evidence offered in the *first* exception, because it tended to prove that the appellee was merely a termor of the slaves in question; that there was a reversionary interest outstanding, and that the evidence ought to have been admitted in mitigation of damages.

That the court erred in excluding the evidence offered in the *second* exception :

1st. Because the interrogatory proposes to elicit the *whole* of a conversation between one of the defendants and one *Briscoe*, part of which had been offered in evidence by plaintiff below and now appellee.

2nd. Because the declarations of *Briscoe* sought by the inquiry, would serve to illustrate and explain an *act*, which act the plaintiff had offered in evidence, and through which he sought to recover, viz: the sale of *Briscoe* to *Campbell*; and

3rd. Because the proof offered by the plaintiff, when taken in connection with an affirmative answer to the inquiry propounded in the interrogatory, would show, that *Campbell* was a *bona fide* purchaser; and therefore, though the sale was made

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by *Briscoe*, without authority, *Campbell* was not a *mere wrong doer*, and therefore a demand and refusal was necessary to maintain the action.

R. J. BRENT and HORSEY, for the appellee :

On first exception we contend, that the defendant cannot be allowed to introduce an outstanding title in a stranger, to defeat an action by a possessor of personal chattels, which have been *tortiously* converted.

On second exception, that we had only introduced the bargaining for the negroes between *Briscoe* and *Campbell*, and the caption of the negroes by *Campbell*, in order to show a conversion by *Campbell*, and therefore it was not competent for the defendants, on cross-examination, to introduce *Briscoe's* declarations touching his authority :

1st. Because they were not shown to be made at the time of the bargaining, but only of the caption of the negroes.

2nd. Because these declarations were not evidence of authority to commit the trespass.

3rd. Because the declarations were immaterial and irrelevant.

MARTIN, J., delivered the opinion of this court.

This was an action of trover. At the trial of the cause below, the plaintiff proved by a competent witness, that the slaves in controversy were upon his farm and in his possession, under the management of the witness, as his overseer, on the 13th of March, 1846; and that on that day, *John Campbell*, one of the defendants, came to the farm, in company with one *Briscoe* and a *Mr. Stuart*, the sheriff of *Charles* county, and that *Campbell*, after bargaining with *Briscoe* for the sale of these slaves, took forcible possession of them and carried them away.

In this condition of the case, the defendants, on cross-examination, asked the witness whether these slaves were not the property of *Richard Dement's* estate, and avowed their purpose to be to give such evidence to defeat the plaintiff's claim, or to offer the same in mitigation of damages. This evidence was objected to. The court, we find, refused to admit it, for

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either of the purposes for which it was offered, unless the defendants proposed to follow up the testimony, with evidence that they acted under authority derived from the representative or representatives of *Richard Dement's* estate. The counsel for the defendants having declined to follow up the testimony as proposed by the court, it was rejected, and the ruling of the court upon this point of evidence, forms the subject of the *first* exception.

The ruling of the court below upon the question raised for their consideration on this branch of the case, was unquestionably correct. The defendant having failed to connect himself with the estate of *Richard Dement*, occupied the position of a *mere tortfeasor*, who had invaded the possession of the plaintiff without authority, and under such circumstances it is very clear, that he could not be permitted to prove, that the title to the property in dispute was not in the plaintiff, but was, at the time of the conversion, outstanding in a third party, with whom he had no connection or privity, to defeat the action, or in mitigation of damages. In the case of *Duncan vs. Spear*, 11 *Wend.*, 56, the Supreme Court of *New York* correctly ruled, that a defendant in trover cannot set up property in a third person, without showing some title, claim or interest in himself, derived from such person. And that it was not competent for the defendants to place themselves under the protection of a title to this property residing in the estate of *Dement*, without showing that they acted under authority derived from the representatives of that estate, and thus relieving themselves from the imputation of being mere wrong doers, is a legal proposition, which has been considered as settled and at rest, in *Westminster Hall*, since the leading case upon this subject, of *Armory vs. Delamirie*, decided by *Chief Justice Pratt*, and reported in 1 *Strange*, 504. In that case it was manifest from the evidence, that the real property was in a third person; but as that property was not connected with the defendant by transfer or authority, he was not allowed to rely upon it, nor to shelter himself from responsibility under it; and the finder of the jewel, a chimney-sweeper's boy, in *London*, recovered from the con-

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vertor, in an action of trover, the full value of the chattel. The cases of *Sutton vs. Buck*, 2 Taunt., 302, and *Burton vs. Hughes*, 2 Bingham., 173, stand upon this principle.

We did not, however, understand the counsel for the appellant as controverting the correctness of this general proposition; but his point was, that the defendants should have been permitted to show, that the plaintiff was in the possession of these slaves, at the time of the alleged conversion, only as a termor, the reversionary interest residing in the estate of *Dement*, as the lessor, not of course in bar of the action, but in mitigation of damages. The proposition presented by the counsel for the appellant is, that in an action of trover by a termor of a chattel against a wrong doer, who has converted it to his own use, the measure of damages is not the full value of the property at the time of the conversion, but its value to the termor, and that, therefore, it was proper in this case to show, that the relation of lessor and lessee existed between the plaintiff and the estate of *Dement*, that the jury might give only such damages as would cover the injury sustained by the plaintiff for the deprivation of the services of the slaves in dispute, for the unexpired term.

This proposition cannot be maintained. In an action of trespass or trover by a termor against his reversioner, for an unauthorised interruption of his possession during the term, the measure of damages would be the actual loss sustained by the lessee. But in an action against a stranger and wrong doer, who has been guilty of an asportation or conversion of the property, the plaintiff is treated as the absolute and unqualified owner of the property, and he is entitled to recover its full value.

By the common (differing in this respect from the *Roman*,) law, the hirer of a chattel acquires, by virtue of the contract, a special property in the thing during the continuance of the term. The hirer is bound by the implied obligations of the contract to restore the thing hired, when the term for which it was hired has determined. *Story on Bailm't*, sec. 414. And although cases may occur in which he would be absolved from this obligation, yet it has been expressly decided, in *Gor-*

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don vs. Harper, 7 *Term Rep.*, 14, that a lessee cannot justify his not returning the goods to the landlord at the end of his term, because a stranger had committed a trespass upon him by taking them away. The language of *Mr. Justice Lawrence*, in *Gordon and Harper*, is :

“The tenant is bound to restore the goods to the landlord at the end of his term, and could not justify his not doing so, because a stranger had committed a trespass upon him by taking them away.”

The law has placed, at the command of the termor, the power of vindicating his rights to the property, if they have been violated, and he is bound to use it. And as he is bound to restore the property to the person from whom he obtained it, or to stand responsible in damages for its full value, he has the right to recover its full value from a stranger who has wronged him. Upon this ground of ulterior responsibility, the borrower of a chattel may maintain an action of trespass or trover against a wrong doer who has invaded his possession, and it must be obvious, that unless he was allowed to recover the full value of the thing of which he was despoiled the remedy placed at his disposal, would not accomplish the purpose for which it was given. In *Story on Bailm't*, sec. 280, the author says :

“But, notwithstanding the borrower has no special property in the thing loaned, still it seems, that if the injury done by a stranger is of such a nature, that the bailee would be liable over to the lender for it, the latter may maintain an action of trespass, and even of trover, founded upon his possession, to recover damages; for the mere possession of property, without title, is sufficient against a wrong doer.”

In the case of *Lyle vs. Barker*, 5 *Binney*, 457, it was held, that a pawnee of goods could maintain trespass against a stranger, who takes them away, and recover the whole value in damages, though they were pledged for less, upon the ground, that he is answerable for the excess to the person who has the general property.

Mr. Chief Justice Tilgman, when considering this question of damages, on a motion for a new trial, said :

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“The point was very little argued, and no authorities cited, (at the trial before the jury,) so that my opinion was, upon a general recollection of the principle, that he who has a special property in chattels, being answerable to the general owner, unless he takes good care of them, may recover the whole in damages against a wrong doer, who takes them away. Upon subsequent reflection and reference to the authorities, I am satisfied that the charge was right.” He then refers to the case of *Heyden vs. Smith*, 13 *Coke’s Rep.*, 69, where it is stated:

“That he who hath a special property in goods, shall have a general action of trespass against him who hath the general property, and upon the evidence, damages shall be mitigated; but clearly the bailee, or he who hath the special property, shall have a general action of trespass against a stranger, and shall recover all in damages, because that he is chargeable over.”

In *White vs. Webb*, 15 *Connect. Rep.*, 302, an action of trover was brought by a second mortgagee against a stranger. It was insisted that the plaintiff could only recover the value of his interest, that is, its value after deducting the amount due on the prior mortgage. It was ruled otherwise. The court said:

“If the suit is brought by a bailee or special-property man against the general owner, then the plaintiff can recover the value of his special property only; but if the suit is against a stranger, then he recovers the value of the property and interest thereon according to the general rule, and holds the balance beyond his own interest, in trust for the general owner.”

We think, therefore, that the ruling of the court below was correct in the *first* exception, in whatever aspect the question presented for their consideration is to be viewed.

There is no analogy between this case and the case of a tenant in common, or part-owner of a chattel, suing for his proportionable share or interest. Unless a plea in abatement is interposed, a tenant in common may recover in trover or trespass his aliquot share or proportion of interest in a chattel, but the rule that gives him the right to sue, confines him to his

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own interest or share. He is under no ulterior responsibility to his co-tenant; the co-tenant may recover from the same defendant his interest in the chattel, and in this second action, the defendant is precluded from interposing a plea in abatement. In the case of *Sedgworth vs. Overend*, 7 Term Rep., 279, this point was expressly adjudged.

The *second* exception relates to the question of conversion.

It will be recollected, that the plaintiff proved that *John Campbell*, one of the defendants, entered upon his farm, and after bargaining with *Briscoe* for the purchase of these slaves, took possession of them by force, without the consent or knowledge of the plaintiff, and for the purpose, as the jury might have found, of appropriating them to his own use. This act standing alone and unexplained, had unquestionably all the elements of a tortious conversion.

The defendants, however, on the cross-examination of the plaintiff's witness, proposed to prove that *Briscoe*, at the time of the taking of the property, stated that he came and took the said slaves by the authority of the plaintiff, for the purpose of paying a debt of plaintiff, for which he, the defendant, was security.

No proof *aliunde*, was offered to show that the plaintiff had invested *Briscoe* with authority to sell these slaves, and it is a clear principle, that even if *Briscoe* had been introduced as a witness, the fact of his authority could not have been established by his own declarations. In the case of *James vs. Stookey*, 1 Wash. C. C. Rep., 330, it was held, that the declarations of a person exercising authority, that he possesses it, can never be received as evidence of the fact of his authority. But the counsel for the appellants contended, that if the declarations of *Briscoe* had been received, they would have shown that *Campbell* was a *bona fide* purchaser of this property; that although the sale was made by *Briscoe* without authority, that the defendant was not a mere wrong-doer, and that therefore, a demand and refusal was necessary to maintain the action.

This position cannot be sustained. The definition of a conversion, so far as it is applicable to this case, is the wrongful

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asportation of a chattel, with the intent to appropriate it to the taker's use, *Step. N. P.*, 2684; and when those two facts are found to exist, that is, the wrongful taking, and the purpose of the defendant to devote the property to his own use, the tortious conversion is established, no matter under what impression he may have acted. The question, whether a party is to be treated as a wrong-doer and tortious convertor, depends upon the inquiry, whether the asportation of the property was unauthorised, and made by him with the intention of appropriating it to his own use; and not upon the motive by which he was actuated, in perpetrating the act. The motive by which a defendant was influenced in converting to his own use the property of another, is only material, and admissible, when it is introduced to repel an attempt by the plaintiff to recover from him in an action of trover, exemplary damages. In *Cromwell vs. Owings*, 7 H. & John., 60, the Court of Appeals said:

“Whenever the goods of a stranger are wantonly taken, or after due notice being given that they are his property, the party injured, if he chooses not to wait, and replevy them from the purchaser after sale, may always attain ample redress in exemplary damages, in an action of trespass or trover, at the hands of a jury. And in cases of mere *mistake*, without any intention to do wrong, less than the full value of the goods taken, will seldom be recovered.”

In the case of *McCombie vs. Davies*, 6 East., 538, the defendant took an assignment of the tobacco from *Coddan*, in good faith, under the impression that it was the property of *Coddan*, and without any knowledge that it had been purchased by him for the plaintiff, as a broker. It is true, that the defendant refused, upon the request of the plaintiff, to deliver the tobacco to *Coddan*, as the plaintiff's broker. But *Lord Ellenborough* did not consider the refusal of the defendant to give the order as required, as evidence of a conversion, under the circumstances of the case. He placed the conversion upon the ground that the defendant assumed dominion over the property, and took it by the wrongful act of the broker. The coun-

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sel for the plaintiff, after insisting that the defendant's refusing to make the transfer, was evidence of a conversion, contended that "at any rate the assuming dominion over it, and taking it by the wrongful act of the broker, was a conversion." And *Lord Ellenborough* said:

"The latter was the true ground to put the plaintiff's case upon; and if the case had been so presented to him at the trial, there probably would have been no non-suit; but it was put upon the ground that the not giving an order for the delivery of the tobacco from the *King's warehouse*, was in itself a conversion, in which I could not concur; not conceiving that the mere not doing an act, was a conversion. But taking the case higher up upon principle, I think that the defendant's acts amount to a conversion. According to *Lord Holt*, in *Baldwin vs. Cole*, the very assuming to oneself the property and right of disposing of another man's goods, is a conversion; and certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?"

In *Stephens and others*, assignees of *Spencer against Ellwall*, 4 M. & Sel., 259, it appeared that the bankrupts, after their bankruptcy, sold the goods in question to one *Deane*, to be paid for by bills on *Heathcote*, who had a house of trade in *London*, and for whom *Deane* bought the goods. *Heathcote* was in *America*, and the defendant was his clerk, and conducted the business of the house. *Deane* communicated to the defendant information of the purchase on the day it was made, and the goods were afterwards delivered to the defendant, and he disposed of them by sending them to *America* to *Heathcote*. This was held to be a conversion by the clerk, although he acted with the most perfect good faith, in entire ignorance of the bankruptcy, and exclusively for the benefit of his employer. A demand was made upon him by the plaintiffs two years after the purchase, but the conversion was not placed upon this ground. *Le Blanc, J.*, said there was a conversion by the defendant long before the demand.

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The statements and declarations of *Briscoe*, who was not a party to the suit, were clearly inadmissible. They were obnoxious to all the objections that can be urged against hearsay evidence; but we think, for the reasons we have assigned, that if *Briscoe* had been introduced as a witness, it would not have been competent for the defendants to have proved the fact which they proposed to establish by his declarations. As that fact, even assuming it to be true, was immaterial, as it did not impose upon the plaintiff the necessity of proving a demand and refusal. It is very clear, we think, on principle, as well as upon the authorities quoted by *Mr. Greenleaf* in the second volume of his treatise on evidence, *sec. 642*, that if the defendant seized upon these slaves and removed them with the intention of converting them to his own use, he was in legal contemplation, guilty of a conversion, though in what he did, he may have acted in good faith, and under the mistaken belief that *Briscoe* was authorised to sell them.

The opinion of the court below was therefore correct as expressed in the *second* exception.

The ruling of the court in the *third* exception, was also correct, and was not controverted by the counsel for the appellants. It is very clear that the testimony proposed to be offered in that exception, was not admissible, without producing the record of the cause to which it referred.

JUDGMENT AFFIRMED.

WILLIAM MORRIS vs. ETHELDRA HARRIS.—June 1850.

In this State, co-heirs are assimilated to coparceners, constituting together one heir.

At common law, every partition between coparceners, has an implied warranty annexed, that if either party loses any of his share by eviction, on

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account of defect of title in the ancestor, he may enter upon the others and defeat the partition as for condition broken.

But all covenants arising from implication of law, are necessarily controlled or annulled by express covenants between the parties.

A conveyance made by a *feme covert* under a privy examination as provided by the act of 1776, ch. 14, operates as an estoppel against her as effectually as if she were *sui juris*.

When a *feme covert* parts with her property by any form or mode of conveyance executed under the provisions of said act, she is by her own voluntary act precluded from disavowing it, and is bound by the express covenants, conditions and terms of her own deed.

When a party covenants for quiet enjoyment and possession against himself and those claiming under him, he excludes the idea of a covenant against all the world.

Two co-heirs executed a deed of partition in which they mutually covenanted that each should hold his part of the land free and discharged from all title, interest, claim and demand of the other. **Held:** that one of these co-heirs was a competent witness for the other in an action brought by the latter against a third party, involving the title to a part of the estate conveyed to the plaintiff by the deed of partition.

A widow who has received her dower with the consent of the heirs at law, is a competent witness for the latter to prove the seisin of her husband in lauds allotted to them.

Dower may be assigned by parol.

In this case a parol contract for the sale of lands made by the ancestor of the complainant with the defendant, was decreed to be specifically executed upon proof that it was partly performed by delivery of possession in pursuance of the agreement.

APPEAL from the *Court of Chancery*.

The bill in this case was filed on the equity side of *Charles* county court, on the 5th of November 1833, by the complainants, *Morgan Harris* and *Etheldra Harris*, (the appellee,) his wife. It alleges, that in 1817, *Samuel Chapman* of said county, discovering a vacancy adjoining his lauds on the Potomac river, agreed with *William Morris*, (the appellant,) that they together should take up the same, that the patent should issue to *Morris*, but the land should be held equally between them, each owning one half thereof; that *Chapman* paid \$77.27, the caution money, on the 1st of March 1817, to the State, and the receipt of the treasurer therefor is exhibited with the bill. The bill further charges, that in pursuance of

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this agreement, the land was patented to *Morris*, and called "*Morris' Landing*," containing fifty-two and one-fourth acres. That afterwards said *Chapman* being about to sell all his lands on the Potomac, purchased of said *Morris* all the latter's interest in said tract of land, being one moiety thereof, at the price offered to *Chapman* for his adjoining lands, to wit: \$— per acre; that in part performance of this contract, *Chapman* was put in possession of the whole tract, and remained in possession thereof from that time until his death, in 1825; that complainant *Etheldra*, is one of the heirs at law of said *Chapman*, and in the division of his real estate, this land was allotted to her as a portion of her inheritance, and that complainants have been and still are in possession of the same, but the said *Morris* has never executed a deed therefor, but has instituted an action of ejectment to recover possession thereof. The bill then prays for an injunction to restrain this ejectment suit, and that *Morris* may be decreed to convey the title to the land to complainants, and for general relief.

The *answer of William Morris*, sets forth that defendant is ignorant of the alleged division of *Samuel Chapman's* estate, and positively denies any contract or agreement on his part, for or touching one-half or any part of "*Morris' Landing*." That respondent being interested in certain lands formerly belonging to one *Knox*, was informed of the vacancy called "*Morris' Landing*," and accordingly in 1817, obtained a special warrant to affect said vacancy, as appears by the patent and the surveyor's records exhibited with the answer. That about the same time, respondent for the benefit of himself and one *Hanson*, obtained another special warrant to affect other vacancy, and finding that *Samuel Chapman* had also obtained another warrant of resurvey, it was agreed between respondent and *Hanson*, and *Chapman*, that the warrant obtained by *Chapman*, should be executed instead of the one for the joint use and benefit of *Hanson* and respondent, and that the costs of the survey, &c., should be paid by respondent and *Chapman*; that this warrant was executed, and all the costs paid by respondent, and the warrant was laid on lands entirely differ-

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account of defect of title in the ancestor, he may enter upon the others and defeat the partition as for condition broken.

But all covenants arising from implication of law, are necessarily controlled or annulled by express covenants between the parties.

A conveyance made by a *feme covert* under a privy examination as provided by the act of 1776, ch. 14, operates as an estoppel against her as effectually as if she were *sui juris*.

When a *feme covert* parts with her property by any form or mode of conveyance executed under the provisions of said act, she is by her own voluntary act precluded from disavowing it, and is bound by the express covenants, conditions and terms of her own deed.

When a party covenants for quiet enjoyment and possession against himself and those claiming under him, he excludes the idea of a covenant against all the world.

Two co-heirs executed a deed of partition in which they mutually covenanted that each should hold his part of the land free and discharged from all title, interest, claim and demand of the other. HELD: that one of these co-heirs was a competent witness for the other in an action brought by the latter against a third party, involving the title to a part of the estate conveyed to the plaintiff by the deed of partition.

A widow who has received her dower with the consent of the heirs at law, is a competent witness for the latter to prove the seisin of her husband in lauds allotted to them.

Dower may be assigned by parol.

In this case a parol contract for the sale of lands made by the ancestor of the complainant with the defendant, was decreed to be specifically executed upon proof that it was partly performed by delivery of possession in pursuance of the agreement.

APPEAL from the *Court of Chancery*.

The bill in this case was filed on the equity side of *Charles* county court, on the 5th of November 1833, by the complainants, *Morgan Harris* and *Etheldra Harris*, (the appellee,) his wife. It alleges, that in 1817, *Samuel Chapman* of said county, discovering a vacancy adjoining his lands on the Potomac river, agreed with *William Morris*, (the appellant,) that they together should take up the same, that the patent should issue to *Morris*, but the land should be held equally between them, each owning one half thereof; that *Chapman* paid \$77.27, the caution money, on the 1st of March 1817, to the State, and the receipt of the treasurer therefor is exhibited with the bill. The bill further charges, that in pursuance of

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this agreement, the land was patented to *Morris*, and called "*Morris' Landing*," containing fifty-two and one-fourth acres. That afterwards said *Chapman* being about to sell all his lands on the Potomac, purchased of said *Morris* all the latter's interest in said tract of land, being one moiety thereof, at the price offered to *Chapman* for his adjoining lands, to wit: \$— per acre; that in part performance of this contract, *Chapman* was put in possession of the whole tract, and remained in possession thereof from that time until his death, in 1825; that complainant *Etheldra*, is one of the heirs at law of said *Chapman*, and in the division of his real estate, this land was allotted to her as a portion of her inheritance, and that complainants have been and still are in possession of the same, but the said *Morris* has never executed a deed therefor, but has instituted an action of ejectment to recover possession thereof. The bill then prays for an injunction to restrain this ejectment suit, and that *Morris* may be decreed to convey the title to the land to complainants, and for general relief.

The *answer of William Morris*, sets forth that defendant is ignorant of the alleged division of *Samuel Chapman's* estate, and positively denies any contract or agreement on his part, for or touching one-half or any part of "*Morris' Landing*." That respondent being interested in certain lands formerly belonging to one *Knox*, was informed of the vacancy called "*Morris' Landing*," and accordingly in 1817, obtained a special warrant to affect said vacancy, as appears by the patent and the surveyor's records exhibited with the answer. That about the same time, respondent for the benefit of himself and one *Hanson*, obtained another special warrant to affect other vacancy, and finding that *Samuel Chapman* had also obtained another warrant of resurvey, it was agreed between respondent and *Hanson*, and *Chapman*, that the warrant obtained by *Chapman*, should be executed instead of the one for the joint use and benefit of *Hanson* and respondent, and that the costs of the survey, &c., should be paid by respondent and *Chapman*; that this warrant was executed, and all the costs paid by respondent, and the warrant was laid on lands entirely differ-

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ent from "*Morris' Landing*," and the lands thus taken up by *Chapman* were called "*Smithfield*." That *Chapman* paid the caution money on "*Morris' Landing*," not because he was interested therein, but because respondent paid the whole cost of "*Smithfield*." The answer then denies the receipt of any consideration, or that respondent ever sold or offered to sell to *Chapman* either "*Smithfield*" or "*Morris' Landing*," that *Chapman* always admitted "*Morris' Landing*" to be respondent's property, and rented the same for several years before his death from respondent, who had the exclusive possession thereof for several years after the survey and patent aforesaid, and rented the same to sundry persons. It then denies that there was any agreement, parol or written, and insists "that if there was any agreement, it was not reduced to writing and signed by the parties as required in such cases by law," and then also denies that the caution money was paid, or possession taken under any such agreement as set up in the bill.

The testimony of *John G. Chapman*, the brother of the appellant, and son of said *Samuel Chapman*, and of *Mrs. Elizabeth Chapman*, the widow of said *Samuel Chapman*, was taken, the purport of which, as well as of the other testimony, is sufficiently stated in the opinion of this court. The deed of partition between *John G. Chapman* and his sister, (the appellee,) and her husband, filed with the commission, is also sufficiently stated in the opinion. The defendant objected to the testimony of *John G.* and *Elizabeth Chapman*, on the ground that they were interested in the result of the suit. Certain copies of accounts were filed in the cause referred to in an agreement of counsel, which contains among others, the following clause: "It is further agreed, that the copy of certain accounts already filed in this cause by defendant, may be read as a copy properly introduced of accounts of *Samuel Chapman*, deceased, in the proceedings mentioned, the original being filed by *John G. Chapman*, in the case of *John G. Chapman, Adm'r, vs. the present defendant*, and the proceedings in the last mentioned case may be read, to show in what manner and under what circumstances the said accounts were made."

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The cause having been removed to the court of Chancery, the Chancellor, (*Johnson*,) on the 18th of April 1848, passed a decree ordering the agreement made between *Samuel Chapman*, in his lifetime, and the defendant, to be specifically executed, and the latter to convey the title to said land to complainant, upon her paying the purchase money therefor, or producing satisfactory evidence that the same had been paid.

From this decree, the defendant appealed to this court.

The cause was argued before SPENCE, MARTIN and FRICK, J.

MAY and R. J. BRENT, for the appellant.

The principal questions on the facts are: 1. Whether *Samuel Chapman* was a partner in the acquisition of "*Morris' Landing?*" To establish the affirmative of this proposition, the appellee relies on the evidence of *John G. Chapman*, and *Mrs. Elizabeth Chapman*:—the first, the son and co-heir, and the last, the widow of *Samuel Chapman*. The appellant has excepted to the competency of both of them. *John G. Chapman* is incompetent, because he is co-heir with *Etheldra Harris*, his sister, and if she is evicted from *Morris' Landing*, is bound to make good her loss for *ovelt*y of partition, notwithstanding the covenant in the deed of *Harris* and wife to the witness, because a married woman *cannot* covenant, and the liability of the witness is therefore direct and palpable, unless discharged by that covenant, and he ought to have been made a party to this suit. *Mrs. Elizabeth Chapman*, is incompetent, because *she is proved to be widow* of *Samuel Chapman*, and could claim her dower if *Etheldra Harris*, recovers the property. But admitting these two witnesses to be ruled competent, still they are insufficient to counteract the positive denials of the answer, because they know nothing themselves, of the matter, save by the declarations of the appellant *Morris*: and we submit, that his unsworn declarations cannot impeach his *positive oath*. There is nothing to corroborate these declarations, save the receipt of the caution money, *which is completely neutralised* by the accounts on the books of *Samuel*

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Chapman, charging *Morris* with the whole amount of that receipt. Then the allegation of partnership *in the land*, is supported alone by proof of *Morris*' declarations, against which we offer the *counter-declarations* of the other party, *Samuel Chapman*, and the fact that *Chapman* swore as witness for *Morris*, in a suit by the latter to recover rent of this very land, and the more *pointed* fact of *Chapman* charging *Morris* with the whole amount of that receipt. And lastly, the facts proved that for several years after the survey and patent of *Morris*' *Landing*, *Morris* was in the exclusive possession thereof, by renting it to *Rye* and *Dunnington*, as *conclusively proved*; and that *Perry* discovered the vacancy, and informed *Morris* of it. 2. Whether *Morris* ever sold out his interest to *Chapman*? This also depends upon the competency of the two witnesses, *John G. Chapman* and *Elizabeth Chapman*. Besides, no written evidence of such sale is produced; no proof of payment of purchase money; or even that *a credit was allowed to Morris*, as promised, according to the evidence of *Elizabeth Chapman*. On this matter, the accounts in the record, although full, between these parties, would seem to negative the idea of such a sale: as nothing relating to it appears in those voluminous accounts. 3. Was *Samuel Chapman* put in possession under such agreement, so as to amount to part performance?

It does not appear that his possession was referrible to such agreement, but must have been taken as tenant merely. Nor does it appear, by any competent or incompetent testimony in the cause, what were the full and complete terms of the alleged agreement, so as to enable the court to decree specific performance.

Finally, the statute of frauds is a flat bar to the whole of this pretended claim, and is sufficiently pleaded in the answer.

THOS. S. ALEXANDER for the appellee, insisted that the chancellor decreed rightly, and his decree ought to be affirmed.

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FRICK, J., delivered the opinion of this court.

The bill in this case was filed by *Morgan Harris* and his wife *Etheldra*, (formerly *Chapman*,) to enjoin an ejectme suit brought by the appellant, for a tract of land called “*Morris’ Landing*,” and to obtain a conveyance of the legal title to the same, by a decree for the specific performance of an agreement between the appellant and *Samuel Chapman* the ancestor of the appellee, in relation to the sale of said land; which agreement it is alleged was in parol, and part performed and executed between the said parties, in the lifetime of *Samuel Chapman*.

The complainants, *Morgan Harris* and *Etheldra* his wife, claimed in right of said *Etheldra*, as one of the heirs at law of said *Samuel Chapman*, in virtue of a deed of partition between them, and the other heir at law, *John G. Chapman*, whereby the land in question was allotted to, and vested in her exclusively. The agreement sought to be enforced was as before said by parol, and the bill charges, that it was partly performed by the payment of the purchase money agreed on, and by the delivery of the premises by *Morris* to *Chapman* in his lifetime, and in pursuance of the agreement.

Morgan Harris died since the filing of the bill.

The answer denies the existence of any such agreement as is charged in the bill; but sets up another and a totally different agreement, with regard to a parcel of land called “*Smithfield*.” That *Samuel Chapman* always admitted “*Morris’ Landing*,” to be the appellant’s property, and had rented the same for several years before his death from the appellant; and that there was no part performance of any agreement between them concerning *Morris’ Landing*. And he relies upon the statute of frauds.

The deed of partition is to the purport following: After reciting that the parties hold as tenants in common in equal shares, the lands of which they are seized in fee as heirs at law of *Samuel Chapman*, and that they have agreed to divide and hold their respective shares in severalty, it is thereupon covenanted, granted and agreed by and between them, that each

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shall hold, possess and enjoy in severalty the respective portion allotted by the said partition; and which each of them by the said deed of partition doth grant, release and confirm to the other; with the *mutual* covenant and grant; that each party shall forever peaceably, quietly have, hold, occupy, &c., free and discharged from all title, interest, claim and demand of the others, their heirs and assigns, &c.

The deed is executed and acknowledged by *Etheldra* the wife of *Morgan Harris* in due form, by privy acknowledgment under the act of 1766.

To establish the facts that *Samuel Chapman* was a partner in the acquisition of *Morris' Landing*, that *Morris* agreed to sell out his interest to *Chapman*, and that in part performance of the agreement he was put in possession of the land, the appellee relies upon the evidence of *John G. Chapman* and *Mrs. Elizabeth Chapman*, the first the son, and the last the widow of *Samuel Chapman*.

To the competency of these parties as witnesses the appellant excepts, insisting that if *Mrs. Harris* is evicted from her moiety by one claiming a better title, she has her remedy over against *John G. Chapman*, or against the moiety assigned to him; and as to *Mrs. Chapman* the widow, that she hath a direct interest in establishing the title of her husband, by reason of the dower resulting to her from the seisin, if established.

In this state co-heirs are assimilated to co-parceners constituting together one heir. 5 *Gill*, 132. And at common law as between them, every partition has annexed to it the warranty implied, that if by defect of title in the ancestor, either loses any part or share of the allotment by eviction, it is treated as if no partition had been made between them. The party evicted, may enter upon the others and defeat the partition, as for condition broken, or may vouch them to warranty, and obtain recompense for the part so lost.

Upon this theory it is assumed, that supposing the appellant to succeed in his ejectment suit, *Mrs. Harris* could treat the partition as a nullity, and require it to be reformed, or proceed in chancery against the proposed witness her co-heir, to recover the moiety of her loss in value.

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Can such right of re-entry exist here? All covenants that arise from implication of law, are necessarily controlled or annulled by other express covenants between the parties. The generality of the implied covenants, is by mutual consent thus restrained and qualified. 4 *Coke*, 80, *Noke's case*. And this in subsequent authorities is recognized as the settled and established rule of law. *Deering vs. Farrington*, 1 *Mod.*, 113. 4 *Bingh.*, 678. 4 *Kent*, 469.

The parties to a partition as parceners may therefore regulate among themselves the extent and limit of their future liability, by the introduction of express covenants to that intent; and will be considered as holding their separate shares independent of any implied warranties, or other conditions than what they have themselves chosen to express. And where the party covenants for quiet enjoyment and possession against himself and those claiming under him, he excludes the idea of a covenant against all the world. It is obvious that neither party could recover on this covenant for an eviction by a stranger. And it seems to be conceded in the argument, that if the right of re-entry for the breach of a condition implied, could in any case be allowed in this country, yet *Mrs. Harris*, if she had been *sole* at the time of the partition, would have been barred by her covenant.

But it is insisted, that as she was covert at the time, her covenant is not binding. As to the obligation of these express covenants upon a married woman, the authorities are not altogether without conflict. It is a well settled principle that the wife is incompetent to bind herself by a contract.

But it has never been doubted that she may convey her interest in lands; and if so, she must be presumed to have the power to do so effectually. Provision to this intent is fully made by the statutes of our State, under which the wife is presumed to act as *feme sole*, because by the privy examination, she is free of the influence and control of the husband. And although under coverture at the time, she may by any legal form of conveyance, executed under such privy examination part with all her interest in the lands, and such conveyance

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operates as an estoppel against her as effectual as if she were *sui juris*. By joining with the husband in the execution of the deed, in the language of the act of 1766, ch. 14, the wife "is barred and foreclosed forever." She is precluded from claiming against the deed, or setting up any title against the grantee.

The true and the only question in this case, is upon the effect of the deed of *Mrs. Harris*; and under the act of Assembly she has parted with all her right to the land held by her brother under that deed. That act, upon the privy acknowledgment and execution of the conveyance, confers upon her the power to do so. By whatever mode of conveyance, or in whatever form the wife parts with her property, under and in compliance with the statute, when executed, she is then by her own voluntary act precluded from afterwards disavowing it, and is bound by the conditions and terms of her own deed.

What must otherwise be the result of every such voluntary partition between parceners? It is not pretended that *Chapman* in case of eviction from his moiety, could recover damages from *Mrs. Harris* on her covenant. She has simply covenanted against her own acts; and that covenant operates by way of estoppel, to debar her from asserting a right in derogation of her grant. In the case of *Nicholson's lessee vs. Hemsley*, 3 H. & McH., 409, relied on by the counsel for the appellant, it is admitted that a *feme covert* by deed and privy examination, may effectually convey her estate in lands, and by words of grant and covenant debar herself of all interest therein. All that was there claimed, was that the wife could not covenant so as to make herself liable in damages. And if in this case the appellee is in no form liable to *General Chapman*, more particularly not under the restricted covenants between them, upon what just principle can he be bound to her? Her only *forum* would be a court of chancery, where equality is equity, and where her claim against him, under a covenant, not mutual or reciprocal would be rejected. For if as *feme covert* she could claim to be bound by no such covenant, can she, at the same time, claim to bind him?

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As regards the incapacity of *Mrs. Chapman*, the mother, there is still less force in the objection that proposes to disqualify her as a witness. She is no party to the partition, and parcellers only can vouch each other. Her portion was voluntarily assigned to her, and in view of the partition which the co-heirs afterwards made between themselves. Dower may be assigned by parol. The assignment here was made, as the testimony discloses, by the mother's first taking by *consent of the parties*, what she thought a proper equivalent, and the remainder was then valued and divided. While she thus claims protection for her dower, she is bound to give protection to none. If her testimony should establish the seizin of her husband in *Morris' Landing*, she can assert no claim to dower in it, under the consent and arrangement between her and the heirs of her husband. The partition shows that the dower accepted by her, had reference to this land as part of the estate of her husband, in the division of which her right of dower was definitively acted on. And if any attempt could now be made to disavow it, would it for a moment obtain the sanction of a court of equity, where alone the claim could be entertained?

The competency of these witnesses thus established, we proceed to a brief comment upon their testimony. The ability and ingenuity of counsel in the attempt to reject it, indicates, at least, its important bearing on the case; and we concur with the chancellor, that by it the case of the complainant is sustained. *John G. Chapman* heard, both from his father and the appellant, that this vacancy of *Morris' Landing*, was first brought to their notice by the elder *Chapman*, and that it was agreed between *Morris* and *Samuel Chapman*, that it should be taken up on joint account. It is true, the patent was issued in the name of *Morris*; but that fact is satisfactorily explained as part of the agreement. The vacancy adjoined the lands owned by one of the *Jenifer* family, and *Morris* "alleging that *Jenifer* had once interfered with him in relation to some land or some other transaction," sought the consent of *Chapman* to take it up in his own name, which was agreed to. *Chapman* was to have half the land, and with that understand-

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ing and agreement, it was taken up. The caution money is proved to have been paid by *Chapman*, and the receipt of the treasurer is produced and proved to shew its applicability; being for \$77.27, received from *S. Chapman*, "for caution and improvements on *William Morris*' certificate, called *Morris' Landing*, for fifty-four and a half acres," and there is evidence to show, that this money was paid by *Chapman* on account of their agreement to take up this vacancy, and hold the land for joint account of both.

It was thus held until 1821, the legal title being in *Morris*, when as the evidence shows, a further agreement was made between them, to sell to *Chapman* the other half; and if he succeeded in purchasing lands from *Jenifer*, adjoining, for which he was then treating, he was to have this other half of *Morris' Landing* at the same price per acre.

As the result of this agreement, we find *Samuel Chapman* in possession of the whole at his death, and the complainants claiming title by descent from him, allege that they are in, under the part performance of the agreement between the appellant and their ancestor, in his lifetime. It is no where pretended that *Chapman* evicted *Morris*, and it is not attempted by the appellant to shew that *Chapman* came in under any other title or agreement. It is not established that he went into the possession as tenant to the appellant; and *John G. Chapman* proves that his father received the rent from 1823 up to 1825, when he died; and his impression is that he was always in possession. Since the death of the ancestor the possession has continued in his heirs. The partition took place in 1827, although the deed between the parceners was not executed until 1832. The bill of complaint in this case was filed in 1833, and the witness never heard of any claim of *Morris*, until the ejectment suit was instituted, which it is the purpose of the bill to enjoin, and to enforce from the appellant a specific performance of his contract.

The testimony of *Mrs. Elizabeth Chapman*, in all its essential particulars, confirms the agreement as proved in the evidence of *John G. Chapman*; that *Samuel Chapman* was in

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possession from the time it was taken up until his death; and within her knowledge the rents were sometimes paid to him.

There is evidence by witnesses produced on the part of the appellant, to shew that they held as tenants under him and accounted to him for the rents, and that they considered the appellant the owner of the land; and an order drawn upon *Chapman* to pay the rent to *Morris*, is used to repel the title set up by *Chapman*. There is no proof, however, that the order ever reached *Chapman*; or if it did, that he paid the whole amount to *Morris*. Relying upon that portion of the testimony which explains the motive, why *Morris*, until the purchase of the other moiety by *Chapman*, held the patent and remained the ostensible owner, it is not inconsistent with the agreement, that he should appear to the world as the owner of the whole.

Rye and *Dunnington*, the witnesses, might therefore properly conceive that they had rented *Morris*' land; and *Morris* so renting to them, is not incompatible with the existing rights of *Chapman*, under the declarations of *Morris* himself, that he had sold the lands to *Chapman*.

The copy of accounts between *Samuel Chapman* and the appellant, filed in this court under an agreement of the counsel, whatever influence (if any) it might have in the decision of the cause, we are compelled to reject. It is produced here in the argument at the bar, and the counsel for the appellee insists, that the agreement embraced *only* "the copy of certain accounts *already filed* in this cause," and is expressly limited to such accounts. Their introduction being opposed upon this ground, we cannot say that the agreement was intended to mean more than it expresses.

DECREE AFFIRMED.

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JOSEPH SHEPHERD vs. MARY BEVIN AND ELIZA BEVIN,
ET AL.—*June 1850.*

It is admissible to show by parol, that a receipt executed by the appellant to his mother, stating that he had received from her, as his guardian, the sum of \$571.64, being his distributive share of his father's personal estate, was intended to operate as a payment of so much money upon lands, for the purchase of which he had made a parol agreement with his mother.

Any paper that purports to be a receipt or acknowledgment for the payment of money, may be explained or contradicted.

Mere inadequacy of price, unattended by fraud or circumstances of suspicion, is no ground of objection where the contract is fair and voluntary, and will not influence a court of equity against enforcing a specific performance, where no undue advantage is taken.

In an agreement made by a parent with a child, a slight consideration will be sufficient to support it.

Money expended in the improvement of lands, on the faith of the contract, constitutes a consideration on which to ground a claim for specific performance.

A parol agreement made by the appellant with his mother, that the latter should convey to him certain lands, provided he would relinquish to her his interest in his father's personal estate, was decreed to be specifically executed against the heirs of the mother, upon proof clearly establishing it, and that it had been in part performed by appellant's, taking possession and making improvements on the lands, and executing a receipt to his mother, as his guardian, for his share of his father's personal estate, with the understanding that it was to carry out this agreement.

This court is not anxious to grasp at slight circumstances, to take a case out of the operation of the statute; nor to allow any latitude of construction, where there is any equivocation or uncertainty. The contract must be clear and definite, and the acts done should be equally clear and definite, and solely with a view to the agreement being performed.

APPEAL from the *Court of Chancery.*

The bill in this case was filed on the 9th of October, 1847, by the appellant, one of the heirs at law of *Mary Shepherd*, to enforce against the other heirs of said *Mary*, the specific performance of a parol agreement for the sale of certain real estate, entered into between the appellant and the said *Mary*, in her lifetime.

The allegations of the bill, answers and facts of the case, are fully stated in the opinion of this court. The receipt

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alluded to in said opinion, as given by the appellant, is as follows: "Received February 18th, 1843, of *Mrs. Mary Shepherd*, my guardian, the sum of \$571.64, being my full distributive share of my father, the late *John Shepherd's* personal estate.
JOS. SHEPHERD."

"Witness:—*Charles Hodges.*"

This receipt was acknowledged by said *Joseph* before a justice of the peace, and recorded in the register of wills' office for *Anne Arundel* county.

John Shepherd, the father, died in 1825, leaving a will, by which, believing he had a right to do so, he devised the land in controversy, which belonged to his wife in fee, to his wife, the said *Mary Shepherd*, "during her natural life, and at her decease to my son, *Joseph Shepherd.*" The said *Mary* died intestate of said real estate in September 1847, leaving the complainant, *Joseph Shepherd*, and the defendants, *Elizabeth*, *Susan*, *William*, and *Samuel Shepherd*, and *Mary Plummer*, wife of *Thomas Plummer*, her children, and *Mary*, *Ann Eliza*, *John W.*, and *Charles Bevin*, the infant children of a deceased daughter, her sole heirs at law, to whom the legal estate in said land descended.

After testimony was taken, and the cause set down for hearing and argued, the chancellor, (JOHNSON,) passed a decree dismissing the bill, accompanied by an opinion, which is reported in *1st Md. Ch. Decisions*, 244. From this decree the complainant appealed.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE and FRICK, J.

McLEAN and DANIEL M. THOMAS, for the appellant, contended, that the decree should be reversed:

1st. Because the true consideration of the receipt is not inquired into for the purpose of invalidating the receipt, but to explain an independent transaction, and therefore the evidence is admissible.

2nd. Because testimony is admissible to set up a parol con-

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tract relative to the transfer of lands, where acts of part performance under it can also be proved.

3rd. Because the proof in this case clearly and definitely establishes the contract, and acts of part performance exclusively referrible to it.

4th. Because, where the consideration, as here, is a *valuable* one, mere inadequacy is no objection to it, unless fraud can be presumed or proved.

5th. Because, where the consideration is partly valuable, other considerations may be proved to substantiate it, and rebut the presumption of fraud.

RANDALL and HAGNER argued for the affirmance of the decree :

1st. Because parol evidence is inadmissible to explain, vary or annul the written receipt of *Joseph Shepherd*, exhibited with the bill, as part of a contract to affect land.

2nd. Because the parol contract set forth in the bill, is void under the statute of frauds:—1st. Because it is not established certainly, definitely and unequivocally. 2nd. Because, if the said contract is sufficiently established, the acts of part performance, relied on by the appellant, are not exclusively referrible to that contract.

3rd. Because it would be inequitable to enforce the contract as set up in the bill, if the same were proved.

FRICK, J., delivered the opinion of this court.

The bill in this case, filed by *Joseph Shepherd*, the appellant, on the 9th of October, 1847, states: That *Mary Shepherd*, the mother of the appellant, was in her lifetime seized and possessed in fee of a certain parcel of land, subject only to the life interest of her husband, *John Shepherd*, the father of the appellant. That *John Shepherd*, the father, at his death, under the impression that he was the fee-simple owner thereof, and had a right so to do, devised the same to the appellant. That the mother being willing and anxious, that the mistaken devise of her husband should be gratified, and that the appel-

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lant should enjoy the land in fee-simple, agreed to convey it to him, provided he would relinquish all interest in his father's personal estate.

The bill then further states, that the appellant agreed to this proposition, and for the purpose of carrying it out, executed to her a receipt for \$561, the amount of appellant's share of said personal estate, although he never received any portion thereof, the receipt being intended merely to carry out the agreement, and to operate as a payment of so much money upon the land; and that immediately thereafter he took possession of the land, in pursuance of the agreement, and has held and possessed the same ever since; his mother always, until her death, treating and speaking of him as the owner thereof. That she had promised and agreed to execute a conveyance to him, whenever requested to do so, but that she departed this life intestate of her real estate, and without having executed the deed, leaving the appellant himself, two brothers, three sisters, and the children of a deceased sister, (the latter all infants,) her heirs at law.

The facts alleged in the bill are admitted to be true, and the relief sought by the appellant is assented to by all, except the infant defendants, who, by their guardian, denied the facts; whereupon the commission issued under which the testimony in the cause was taken.

The receipt produced in evidence, bears date the 18th of February, 1843. It professes to be a receipt signed by *Joseph Shepherd* from *Mrs. Mary Shepherd*, his guardian, for the sum of \$561.64, being in full for his distributive share of his father's, the late *John Shepherd's*, personal estate, witnessed before a justice of the peace, and acknowledged before him by *Joseph* to be his act and deed, for the purpose therein mentioned, according to the act of Assembly, &c.; and testimony was further adduced by the appellant, to prove that the money expressed in the receipt was never paid, but was retained by the mother in pursuance of the agreement, and as part of the contract upon which she was to execute to *Joseph* a conveyance of the land.

To this testimony the infant defendants excepted, on the

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ground that it was offered to vary, explain or contradict the written instrument of the party, and was therefore illegal and inadmissible.

We are of opinion, that the objection is not well taken, and that evidence is clearly admissible to explain the intention of the parties to the paper.

This instrument, it is true, is the proper and authenticated evidence of the discharge of the guardian from the appellant's proportion of his father's estate; and it may be conceded, that in the face of such a discharge, it would scarcely be competent to the ward to open the account, on the ground that nothing had been paid or received, unless it might be upon an alleged mistake or fraud. But it is not proposed to impeach the true character and purpose expressed in the receipt, or to deny that it was designed to discharge the amount due to the appellant from his guardian, and pass that amount to her credit as money, paid in liquidation of his claim against her. But it is asserted, that the application of the money and the receipt was agreed upon at the same time, as the simplest form to pay to her the consideration for the land, which she had proposed and agreed to convey.

The general rule, that evidence is not admitted in explanation or contradiction of the contents of a written paper, is subject to the very exception here presented. Any paper that purports to be a receipt or acknowledgment for the payment of money, may be explained. The object here is not to repudiate the receipt, or to deny that it is a discharge of the indebtedness of the mother as guardian, but to show the application of the money that constructively passed by the receipt, to the object previously agreed upon between them. The evidence proposes to explain how the money agreed upon as the consideration for the land to be conveyed, assumed the form of payment which is given to it by this receipt. No effort is made to impeach the paper. The payment of the money, or a discharge for the amount in settlement of the personal estate of the father, is admitted. The next object is to show its simultaneous application to the contract which induced it, and there

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is no rule which excludes extrinsic evidence, to show the true design and character of such a paper. On the contrary, it is a familiar principle, that a receipt acknowledging the payment of money, is susceptible of explanation or of contradiction. See 1 *Gill*, 90, *Wolfe vs. Hauver*. And 1 *Gill*, 433, *Cole vs. Albers and Runge*. 2 *H. & G.*, 114, *Stewart vs. The State*.

This receipt being thus open to explanation, we proceed to the testimony of *Susan* and *Elizabeth Shepherd*, two of the defendants, which, upon application to the chancellor, was taken, subject to all legal objections. And this evidence being free from all exception, the first thing that forcibly suggests itself, is the established fact that no money was paid in hand to the appellant at the time. No positive contract is proved by either of the sisters; but *Susan* says, “that it was in consideration of this receipt, that the mother put *Joseph* in possession of the land, and that he paid taxes on it; that the mother paid *Joseph* no money, and frequently said she never intended to pay, as she had given him the land; that he was to take possession of it, by executing to the mother a receipt in full for his proportion of the father’s estate.” *Elizabeth Shepherd* confirms all this by her answers to the interrogatories, and adds, “that the heirs at one time proposed to the mother to sell the land, and divide the proceeds among her children, but the mother refused, saying it had been left to *Joseph* by the father, and she intended it for him.” So far the proof is definite, that she put him in possession of the land, in consideration of his relinquishing the amount due to him from the father’s personal estate. And that this was in part performance of a contract between them to that effect, designed to give to him a fee-simple estate in the land, is made clear and manifest by the testimony of *Dr. James S. Owens*. He says, “that some years past, he was requested by *Mrs. Shepherd* to draw her will; that she, at that time, told him she designed giving the land to *Joseph*, that the father intended it for him, and that she requested witness to say to *Joseph*, that she desired he would take possession of the land, and she would sign a deed conveying

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the same to him, so soon as one for the purpose was prepared, and he knows, that after communicating this conversation to *Joseph*, he took possession of the land.” Now, when he took possession of the land, the sisters say that it was in consideration that he should execute the release of his father’s personal estate, and he did do so. The context of this testimony shows obviously, that this possession of the land, and the promise of a deed of conveyance from the mother, was immediately after the execution of the receipt. We have, therefore, a contract clear and definite in all its component parts, fully performed on the part of the son, and wanting on the part of the mother only the execution of the deed.

The inducements to this contract may be thus summed up: *Samuel*, the husband of *Mary*, and the father of *John Shepherd*, under the impression that the wife’s property was subject to his disposal by his will, devised it to his wife for life, and remainder to *John* in fee. After his death, the mother asserted her separate right, took possession of the land, and became the guardian of her infant children. It appears from a portion of the testimony, that at one time she spoke of selling the property, and some of the children joined in advising the sale. The particular period to which this refers is not stated, but from the connection of the testimony, it was obviously *before Joseph* was put in possession. For after that, it is proved that she refused to hear of a sale, because she said she intended the property for him. When the time afterwards arrived for the settlement of her accounts as guardian, it is plainly intimated that she was destitute of money, or, in the language of one of the daughters, had none to spare; and recurring to the intention of her husband, expressed in his devise to *John*, with an impulse both natural and laudable, she proposed to confirm the devise, upon his surrendering all claim to the father’s personal estate. The proposition was made originally from herself; not to give him a temporary interest by possession, but to confer the title in fee and execute to him a deed, because she designed and proposed to do what the father intended by the will, and so expressed it. If this proposition had been in writ-

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ing, could there be any doubt or hesitation about it? Clearly not. And when in compliance with it, the son executes the receipt and discharges her, and immediately thereon she surrenders the possession of the land, what remains to complete the contract but the execution of the deed? And this is now sought from the other heirs of *Mary Shepherd*, as the only ingredient to the final consummation of the contract.

Much stress has been laid upon the supposed inadequacy of the consideration. But this objection, standing alone, is, of itself, of little or no weight, when it is clear, as in this case, that the parties understood their bargain, and in the fulfilment of it there is no pretence of fraud or circumvention. The cases cited by the counsel for the appellees on this head, are all distinguishable from this. None of them assert that inadequacy of price alone, unattended by fraud or circumstances of suspicion, was ever declared a sufficient ground to avoid a contract in other respects regular. On the contrary, the parties have a right to make their own contract, and the mere inadequacy of price is no ground of objection, where the contract is fair and voluntary. 2 *H. & G.*, 100, *Black vs. Cord*. 2 *H. & G.*, 114, *Stewart vs. The State*. A sale may be made of property, where the price is manifestly inadequate to the value, and under a hard and pressing necessity on the part of the vendor, but in the absence of fraud, equity could interpose no relief. 10 *Vez.*, 474. 8 *Vez.*, 518. Improvidence or inadequacy of consideration, do not influence a court of equity against enforcing a specific performance, where no undue advantage is taken. 5 *Gill*, 288, *Young vs. Frost*. But this case has still a stronger claim to exemption from any stringent rule of law, by reason of the peculiar relation of the parties. The agreement is not between strangers, but the parties are mother and son, in the closest relation of life. The contract has the meritorious consideration of love and affection, superadded to the valuable consideration which passed between them. Could the appellant reasonably have declined the proposition to release the amount of his claim against the mother, when coming from herself? And, as her own proposition to

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her child, of what weight is the objection on the score of the inadequacy of the price proposed and accepted by herself? No small part of the consideration besides, acting upon her motives, was the desire to gratify the last expressed wishes of her deceased husband. And in an agreement made by a parent with a child, a slight consideration will be sufficient to support it. 4 H. & McH., 258. It is true "this consideration, however slight, must be performed," and it has been our object to show, that in this case it has been done strictly with a view to, and within the agreement between the parties. 2 Story Eq., sec. 762. The case of *Hays vs. Hollis*, 8 Gill, 357, decided at the present term of this court, is, upon this point, precisely parrallel, and obviates all further remarks upon the objection to the adequacy of consideration in the case now before us.

But there are other and additional considerations which, in our opinion, strengthen the claim of the appellant. It is proved, that upon receiving possession, *Joseph Shepherd* proceeded to enhance the value of the land, by building a barn and other improvements, at a cost estimated by witnesses at \$500. This, however, is attempted to be neutralized by other evidence, that the proceeds of the land in his possession, were more than equal to any amount expended by him upon the improvements. It is therefore insisted, as the true equity of the case, that conceding the \$571 as paid to the mother, we are to look to the usufruct of the property during the possession, as a full equivalent for any improvement made upon it, and by holding the land chargeable with the mother's indebtedness to *Joseph*, reimburse him by a decree for the sale, out of the proceeds thereof. In other words, to reinstate the parties in *statu quo*, where they stood before the release was executed, and hold the estate of the mother liable to refund the amount.

This can only be deemed equity in a case where no definite contract appears, or at least none so specific as to justify a decree for performance of it. For where the case is clearly and fairly established, no court of equity could stop short of a decree for the full performance. None of the cases cited on this branch of the argument, express any other doctrine. On the

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contrary, the case mainly relied on in 9 *Peters*, 204, *King's heirs, vs. Thompson and wife*, where the court decreed that the property should be sold, and the proceeds applied first to the payment of the money expended on the improvements, proceeded upon the hypothesis that the evidence in the case failed to establish the specific terms of the contract; while at the same time there was an undoubted agreement, such as induced the party to enter upon the property, and expend his money upon it, as if it were his own. But the court held that the evidence did not sufficiently establish the terms of that agreement. There was no question, however, that the complainant acted under it in taking possession and expending his money upon the property. As no precise contract was proved that would warrant a decree for specific execution, it was but equity that such a decree should be passed, as would afford the complainant a just remuneration for the improvements which he had without fraud, and in good faith made upon the property.

Relying upon the testimony of the witnesses before referred to, there is in this case clear proof of a contract, definite and specific in its terms. But the force of their evidence is supposed to be repelled by various declarations of the parties, inconsistent with the agreement set up. She told *William Shepherd*, one of the witnesses, that "all the rents were settled, in other words, that she intended to charge no rent," and "she spoke of selling the land." This latter declaration, we have before referred to the period antecedent to the agreement; because it is distinctly affirmed by another witness that when the sale was proposed among the heirs, the mother, as distinctly refused, saying the land was intended for appellant.

At one period she was willing to sign the deed, and directed it to be prepared. But she afterwards determined to consummate the agreement by her will, and in this state of things, she might well say that all rents were settled, or none to be charged. And in the position in which he found himself, the appellant also might well have said in the presence of his mother, "that the property did not belong to him, and he would repair it no more, until he *had a better right*." It was quite natural,

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(and the conversation was said to be in pleasantry,) that he should hint as he did, strongly at the caprice of the old lady, in changing from the promised deed, to the last resort of a will. *Doctor Owens* had communicated to him the instructions of the mother; and under every proper restraint of filial duty, the appellant could not well suggest a coercion in her life time of what he could not doubt she would, in good faith, execute by her will, and confirmed by her own reply, "that he had as good right as he ever would have, *until her death.*"

But whatever reasons may have influenced the procrastination and failure to execute the deed, and whatever motive she may have had for desiring to substitute the will in its place, the subsequent caprice of the mother, or any change of intention on her part, could not alter the subsisting contract between them, which was so far executed by both parties, as to require only the execution of the deed on her part to complete it. And such a deed she told her daughter *Susan* she had requested *Doctor Owens* to prepare, who was instructed by the mother to tell *Joseph* to take possession, and she would sign a deed.

As regards the payment of the money as part of the agreement, by the receipt and discharge of the mother upon her guardian account, there is no question. It was paid under this very agreement, that he should have the land. The precise mode of conveyance was designated, and in every *other* particular, the contract was executed. The appellant laid out considerable sums in the improvements, and it is proved to have been done with her knowledge and express approbation. Independent of the meritorious and the valuable consideration before existing in the case, money thus expended in the improvement of the lands, on the faith of the contract, constitutes a consideration on which to ground a claim for specific performance. To eject him now, when all these acts were done in good faith, with her approbation, and in reference to the contract to make him a conveyance of the land, would be to inflict serious injury and injustice, and in the language of the authorities, operate as a fraud upon him, who has performed his part of the contract, in the confidence that the other party would do the same. 2 *Story's Eq.*, sec. 761.

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It is further with the observation, that during the whole period after he obtained the possession, *Mrs. Shepherd* never exercised any act of ownership or control over the property; but referred to him on a particular occasion, stated by one of the witnesses, for the payment of the taxes. *Doctor Owens* says "that in all her conversation with him in reference to the land, she continued to convey the impression that she had given it to *Joseph*; and that he afterwards drew her will in strict accordance with her direction to give it to *Joseph*; but by reason of his neglect, and the suddenness of her death, it was never executed." And *Welsh*, who proves the possession in *Joseph* for four years, and estimates the improvements he made at \$500, says, "she always expressed her willingness to give him a deed whenever proposed; because, as she said to *Samuel Shepherd*, the brother, 'the others had received their share of the father's estate, while *Joseph* had received none.' "

All these declarations confirm the promise of the mother to secure him the land, as the father had devised, and indicate the promise simultaneous with the receipt and discharge for the money due to him, and the possession given of the land. Could these acts have been done by the appellant, without reference to the agreement, and are they such as he would have made, looking to a naked unconditional possession of the property revocable by the death of his mother? If she afterwards contemplated to substitute a will for the deed she was bound to give, it cannot alter his relation to the contract. He might, from relations of duty and affection to her, have rested satisfied with either alternative, without desiring to disturb or counteract her plans during life, conscious, always, that if she did not perfect the agreement by her will, that his claim in equity to the title of the land, always remained to him upon the contract.

This court is never over anxious to grasp at slight circumstances to take a case out of the operation of the statute, nor to allow themselves any latitude of construction, where there is any equivocation or uncertainty in the case presented. They adopt the rule that the contract should be clear and definite,

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the acts done should be equally clear and definite, and solely with a view to the agreement being performed. *2 Story's Eq.*, sec. 762.

It may be matter of regret that there ever was a departure from the strict and rigid construction of the statute. But the embarrassments in fixing the precise character of every variety of agreement in parol, and the circumstances that exclude them from the operation of the statute, have elicited the settled rule by which courts of equity are now governed. And without any desire to relax them, we think the appellant here has clearly established the contract charged, and also such part performance of it as entitles him to relief.

DECREE REVERSED.

ELIJAH BOOSTER vs. ISAAC ROGERS, ADM'R OF JOSEPH M. ROGERS.—*June* 1850.

In order to make a paper the last will and testament of a deceased person at the time it is written, it must appear that such person possessed the *animus testandi* at that time.

A paper, though not a last will and testament at the time it is written, may be made such afterwards by adoption.

A paper, though intended merely as instructions or a memorandum, to enable the scrivener to prepare the will, will be admitted to probate, if the more formal will be left unfinished by reason of any act which the law pronounces to be the act of God.

There must, however, be a continuance of the intention of the deceased, down to the time when the act of God intervened and prevented the execution of the formal instrument.

An immediate or sudden death is not required, if according to the proof, the jury are satisfied that there was no change of intention in regard to the provisions of the will.

An instruction given to a jury is not necessarily correct, because it is given in the very words which the court of last resort used in a case where they acted both as judge and jury.

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An instruction which takes from the jury the inquiry whether the deceased, at the time of preparing the paper, sought to be established as his last will and testament, was of sound and disposing mind and memory, and capable of making a valid contract, is erroneous, where testimony has been offered, going to question his sanity.

If there is proof going to show that a paper, not originally intended as a will, was afterwards made such by adoption, or because without any change of purpose, the party was prevented by death from executing a more formal instrument, it is error to grant a prayer which excludes this question from the consideration of the jury.

APPEAL from *Baltimore* county court.

The appellant filed a petition in the orphans court for *Baltimore* county, on the 29th of April 1848, stating that administration on the estate of *Joseph M. Rogers*, late of said county, deceased, was granted to *Isaac Rogers*, the appellee, on the 5th of October, 1848, but petitioner is informed, and believes that said *Joseph* left a will, by which a legacy is given to him, and he prays that a citation may be issued to said *Isaac*, and that he be required to produce said will if in his possession, and if not, to answer whether he has any knowledge thereof, or of any paper purporting to be a will of said *Joseph*.

The appellee answered this petition on the 10th of May following, and states that said *Joseph M. Rogers* died intestate, never having executed any will. He, however, filed as a part of his answer, a paper marked "JR," which respondent received from *Walton Gray, Esq.*, of *Baltimore*, a short time after the decease of said *Joseph*, he cannot say whether said paper is, or is not in the hand writing of said *Joseph*, it being in some respects similar to, and in other particulars dissimilar from his handwriting; that he did not, at the time of receiving it, nor has he any time since regarded said paper as the will of said *Joseph*.

The following is the paper referred to as JR:

"My sister Mary Ann Magraw, the inst. of five thousand dollars, to be invested in some good stock, such as my father, *Isaac Rogers, Harford county*, shall approve of, who I wish to take charge of it, I, if I should dye before him; if she dyes

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without issue, I wish the money to go back, or revert back to my sister, Martha K. Hartshorn, *wife of Joshua Hartshorn, Harrisburg, Pennsylvania*, and my brother E. S. Rogers, *Harford*, equally, or their heirs.

“My sister M. K. Hartshorn, one thousand dollars.

“My brother Evans S. Rogers, *Harf.*, one thousand dollars.

“Elijah Bufter, *Baltimore city*, five thousand dollars.

“Elijah Bufter’s son, Joseph Rogers Bufter, two thousand dollars, the int. to be applied towards his education, untill he arrives at 21 ys., my father to take charge of it untill this time. The firm of Rogers & Magraw, to be settled immediately. The firm of H. Abbott & Rogers; one year from my death to be settled. My watch and jewelry to my sister Mary. Anny Magraw.

“The balance of my property to my father, to dispose of among my sisters and brother as he may deem best. My father to be my *Exetor*.”

Afterwards, upon application of the appellant, the following issues were sent to *Baltimore* county court for trial.

1st. Did the said *Joseph M. Rogers* die intestate?

2nd. Did the said *Joseph M. Rogers*, in his life time, make a will, and if so, was such will unrevoked at the time of his death, and what were the contents of such will?

At the trial, the plaintiff proved by *Walton Gray*, that some time in 1847, *Joseph M. Rogers* delivered said paper marked “JR,” to witness, with instructions to prepare him a will; with the same dispositions of his property as contained therein, said paper is in the handwriting of the deceased, except the portions in italics, which were interlined by witness, in the presence, and with the assent of deceased; that about two weeks afterwards, deceased, in company with *Mr. Abbott*, his partner, went to witness office to execute the will, when *Gray* said it was not ready, and told him to call again; whereupon *Gray* prepared a will in conformity with the disposition of his property contained in said paper, and called at the counting house of deceased, in *Baltimore*, on two occasions, for the purpose of getting it executed. The deceased was not there on either oc-

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casation, and *Gray* never saw deceased at any time, when he had the will so prepared, with him. In about two weeks from the time of last calling at *Gray's* office, deceased called again with *Mr. Abbott*, to execute the will, when *Gray* remarked, "I have prepared the will and left it at my house." About two weeks thereafter, deceased called again, with *Mr. Abbott*, upon *Mr. Gray*, and said, "is the will ready?" when *Gray* said, "I have not been able to find it yet." Deceased then requested *Gray* to prepare a new one. The day before deceased left for *Bedford Springs*, in July, he again called and said, "Is the paper yet ready?" *Gray* said it was not, and inquired of deceased, if he had changed his mind in any way in regard to the disposal of his property? Deceased replied, he had not, he was going to *Bedford Springs*, and it would be time enough when he got back, that said paper remained in the possession of *Gray*, until three or four weeks after deceased's death, when defendant called and demanded it, and *Gray* then delivered the paper to him.

The plaintiff further proved by *Mr. Abbott*, a partner in business with deceased, that in May or June 1847, witness went into the counting house and found deceased sitting at a desk writing. Deceased said to deponent, "I am writing my will, do you wish any arrangement to be made in my will in regard to the business of the firm?" Deponent said, "I would like to have twelve months to settle it up." Deceased continued writing for almost an hour, and then handed witness a paper to read, and then asked witness to go with him to *Gray's* office, as he was going to have *Gray* prepare his will, which he asked deponent to witness and keep for him. They went to *Gray's* office together, and deceased gave *Gray* a paper, and instructed him to draw therefrom a will. The paper was written on half a sheet, and was like the paper "JR." Witness further testifies, that subsequently on three or four occasions, at deceased's request, he went to *Gray's* office with him, for the express purpose of witnessing his will. The plaintiff further proved, that the deceased was very much attached to the plaintiff, and that between them there existed the closest inti-

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macy, and that sometime about the 20th of June 1847, deceased said to *Mr. Selvage*, “*Elijah* always takes care of me, and I’ve left him snug”—or,—“I’ve made him snug.” By *Mr. Sutton*, that on the 18th of July 1847, deceased and witness left *Baltimore* for *Bedford Springs*; that on the road, deceased said to him on one occasion, “*Booster* has been a friend to me, has been with me from the commencement of my forge in *Harford* county, has saved me a great deal of money, and I intend he shall be paid for it, and I have made provision for him and his family, if I never get back.” After about two weeks, they started on their return to *Baltimore*. On the 2d of August, when near *Hancock*, *Mr. Rogers* was attacked with illness. It was found impossible to proceed, they stopped at *Hancock*, and the night of their arrival, *Rogers* became delirious, and knew no person except for a moment at a time, afterwards. He died on the 13th of August, and during his illness, on the second or third day after he was taken, *Booster* came up from *Baltimore*, bringing *Dr. Gibson* with him, nursed the deceased constantly, until the day of his death, slept by his bedside, and came down afterwards with his remains to *Baltimore*.

The plaintiff also offered in evidence the inventory of the deceased’s estate, and the first administration account showing a balance due the estate of \$12,815.54.

And proved that deceased died without issue and unmarried, leaving one sister of the whole blood, *Mary Ann Magraw*, and one sister, and brother of the half blood, *Martha K. Harts-horn* and *Evans Rogers*, the persons mentioned in the paper “*JR.*” And further proved by a number of witnesses, the great attachment of deceased to the plaintiff, that they were constantly together, that deceased often said “*Booster* would do any thing for him, would act in any menial capacity to serve him.”

The plaintiff further proved by a number of witnesses, and among others, by *Mr. Abbott*, his partner, that deceased was of perfectly sound mind up to the time of his leaving *Baltimore* for *Bedford Springs*, that though his mind had become impaired by intoxication, it was entirely fit for the transaction of

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business when sober; that they did business with him, and that they would have had no hesitation in taking a deed from him; that in the spring of 1847, he went to *Philadelphia* and *New York*, for the purpose of making contracts and purchases for the firm.

The defendant then offered evidence by a number of witnesses, that deceased had been of unsound mind for six months or longer preceding his death; that his mind had become greatly impaired by the long use of intoxicating drinks, and that for six months preceding his death he was incapable of attending to business; and proved by *Dr. Thomas*, that he attended deceased during a spell of sickness in September 1846, that he then considered him, through feebleness of intellect, incapable of executing a valid deed or contract; that his mind seemed greatly impaired from hard drinking; that in the judgment of witness, his mind could not recover its strength if the same habits were continued. The defendant then offered evidence by a number of witnesses, that deceased continued his intemperate habits, from the time of his recovery from said spell of sickness until his last illness, and that he became more and more intemperate, and that during the last six months of said period he was incapable of executing a valid deed or contract; and proved by *William Wetherall*, a book-keeper in the firm of *Rogers* and *Magraw*, that in the spring of 1847, *Gray* the witness on the part of plaintiff, came to the counting house of said firm, that deceased seeing *Gray* approaching remarked to witness, "I know what that man wants, I will not do it;" deceased then went out of the counting room and conversed with *Gray* within sight, but out of the hearing of witness; and returned in a few moments much excited, and said to witness, "some people must take me for a fool, but they will find themselves mistaken, I wish you to take notice, that I will not sign that paper, I want my father to have the disposal of all my property when I die, he will know best what to do with it." that some weeks after the death of said *Rogers*, witness and a *Mr. Hartshorne* went with defendant to the office of *Gray*, who on request delivered to defendant the paper "JR," and

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stated, that he had gone to the store of deceased with a will prepared from the paper, but that the deceased refused to sign it." And proved by *Mrs. Hemphill*, that deceased was very warmly attached to his father, the defendant, and to his sister, *Mary Ann Magraw*; that deceased on several occasions, within a year before his death, had declared to witness, his aunt, that he intended to make a will, leaving all his property to his sister *Mary*, his father to take care of it for her. And further proved by *Mr. Van Horne*, the innkeeper at *Hancock*, where deceased died, that *Mr. Sutton* said to deceased, "hadn't you better make a will," and he replied, "its not necessary, all I have will go to my sister *Mary*." *Mrs. Van Horne* the innkeeper's wife and *Dr. Wilson* the attending physician, both corroborate the last witness as to the use of this expression by deceased, at that time and place, and that when this declaration was made, the mind of the deceased was more composed than at any other time during his last illness, having been calmed for the time by medicines.

Whereupon the plaintiff prayed the court to instruct the jury: 1st. If they believe from the evidence that *Rogers* placed in the possession of *Gray*, the paper "JR," with directions to draw therefrom his will, and that said paper contained his wishes with regard to the disposition of his property, and remained in *Gray's* possession, and that *Rogers* called on one or more occasions to execute a will drawn in conformity with his said directions, and that from any failure on the part of *Gray*, to prepare or furnish the paper, it was not executed, then the jury are bound to find as to personal estate, for petitioner upon both issues, unless they shall believe that subsequent to the time of placing said paper in *Gray's* possession, *Rogers* changed his intention, and did not design at the time of his death that his will should be in conformity with the instructions contained in said paper.

2nd. If they find that *Rogers* fully meant and intended to execute a will of the same tenor with said paper, and was prevented from carrying that intention into effect by the act of God, or by any contingency not imputable to any change of

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intention on his part, then the jury are bound to find for petitioner.

3rd. If they find that *Rogers* desired and instructed *Gray* to prepare his will, and that his wishes as to the disposition of his property were contained in said paper, and that *Rogers* died without any change of intention on his part, but adhered to his wishes as contained in said paper, then said paper is his will, and the jury are bound to find for petitioner.

4th. If they find that *Rogers* handed said paper to *Gray*, and directed him to draw a will in conformity thereto, and that it remained in the possession of *Gray* until after the death of *Rogers*, and that the instructions therein contained were unobjected to by *Rogers*, then it is his will, and the jury are bound to find for petitioner.

5th. If they find that *Rogers* designed to execute a will of the same tenor as said paper, and then, or afterwards, designed that said paper should have effect as his will, even if not formally executed, said paper is his will, and there is no evidence of the revocation thereof, and the jury are bound to find for petitioner.

6th. If the jury find that said paper was handed by *Rogers* to *Gray*, with instructions to draw therefrom a paper, which he proposed to execute as his will, and that said last mentioned paper was so prepared, then his intentions remaining unchanged, said paper so prepared was his will, and the bequests therein contained are valid as to personal estate.

7th. If they find the facts stated by *Gray*, and that from the mere neglect or delay of *Gray* to prepare or furnish the same, a more formal paper never was signed, and that *Rogers* continuously desired and wished to execute a paper carrying out his wishes, as contained in "JR," without any change or deviation, and the day before he left for the springs, he called upon *Gray*, for the purpose of signing the more formal paper, which was not produced from having been lost or mislaid, and that he then announced that "JR," contained his entire wishes as to the disposition of his property, and that he would sign the more formal paper upon his return, and if the jury shall

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further find, that within three or four weeks thereafter, he died, adhering to the said disposition of his property, as manifested by the paper "JR," then they are bound to find for the petitioners.

8th. If they find that the deceased fully meant and intended to execute a will, of the same tenor with "JR," and was only prevented from carrying that intention into effect, by extrinsic circumstances, such as he himself had no control over, and such as are not justly imputable to any change of intention on his part, then the jury are bound to find for the petitioners.

And the defendant also prayed the court to instruct the jury:

1st. Although the paper "JR," was prepared and delivered as stated by *Gray*, yet it is not the last will and testament of deceased, unless the jury shall further find that it was intended by deceased to operate as his will in its then state and condition.

2nd. That to authorize the jury to find that said paper is the last will and testament of deceased, they must be satisfied by the evidence that it was written by *Rogers*, *animo testandi*, and intended, as it stood, to be his last will and testament, without looking to any thing further to be done in order to be perfected.

3rd. That if the jury find that *Rogers* in his last illness, and after his several interviews with *Gray*, was requested, solicited, or advised, to make a will, and that he declined to do so, and declared that it was unnecessary, and that he designed that all the property he might die possessed of, should go to his sister, *Mary Magraw*, and that at the time of so declaring and declining, said *Rogers* understood what he was saying, their verdict must be for defendant, upon both issues.

4th. That "JR," is not the will and testament of *Rogers*, even though the jury shall find the facts detailed by *Gray* and the other witnesses of the plaintiff, provided they believe from the evidence that said paper was placed by *Rogers* in the hands of *Gray*, as instructions to prepare a will to be thereafter executed by *Rogers*.

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The court (FRICK C. J.,) granted all the defendant's prayers, and refused the plaintiff's, who excepted, and the verdict being against him, appealed to this court.

The cause was argued before CHAMBERS, SPENCE, MAGRUDER, and MARTIN, J.

By WM. B. PERINE and RICHARDSON, Attorney General for appellant, and

By NELSON and YELLOTT, for the appellee.

The prayers made by the respective parties in the county court, indicate the points urged in argument in this court.

MAGRUDER, J., delivered the opinion of this court.

The issues in this case certainly are not those which are usually sent from the orphans court, for trial by jury, in cases of this description; and are so framed, that a verdict in favor of the petitioner, which was sometimes asked, would have been of no advantage to the appellants. They do not, indeed, refer to the paper, JR. No other paper, however, was produced; no attempt was made to prove that any other, which could be regarded as the last will and testament of the deceased, was in existence.

In order to make a paper the last will and testament of a deceased person, at the time it is written, it must appear that such person possessed the *animus testandi*, at that time.

A paper, although not a last will and testament at the time it is written, may be made such afterwards, by adoption.

A paper, though intended merely as instructions, or a memorandum to enable the scrivener to prepare a will, if the more formal act be left unfinished, may be made a will, by any act which the law pronounces to be the act of God. 2 *Eccl. R.*, 144. 6 *Eccl. R.*, 19. 2 *Addams*, 490. 5 *Eccl.*, 188. There must, however, be a continuance of the intention of the deceased, down to the time when the act of God prevented the execution of the formal instrument. An immediate, sudden death, is not required, if according to the proof, the jury are satisfied, that there was no change of intention, in regard to the provisions of the will.

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In the case of *Tilghman vs. Stewart*, 4 H. & J., 156; and *Brown vs. Tilden*, 5 H. & J., 371, the court had not the aid of a jury, and was to settle the facts as well as the law. In pronouncing their judgment they necessarily decided questions, the decision of which, in the trial of issues by a jury, belongs exclusively to the latter. An instruction given to a jury, is not necessarily correct, because it is given in the very words which the court of last resort used in a case wherein they acted both as judge and jury.

With this understanding of the law, we proceed to notice the prayers of the appellant, in the course of the trial of these issues.

The court was correct in refusing to give the instructions asked by him, because all of these instructions take from the jury the inquiry, whether the deceased, at the time of preparing the paper, or at any other time, to which the prayers refer, was of sound and disposing mind and memory, and capable of making a valid contract? There certainly was testimony going to question his sanity, and of the weight to be given to that testimony, the jury were to be the judges. So if the design of any of the prayers was to obtain an instruction, that the paper, though not originally intended as a will, was afterwards made so by adoption, or because without any change of purpose, he was prevented by death from executing a more formal instrument, the prayer ought to have been so framed as to inform the jury of what the evidence must satisfy them, in order to warrant a verdict, establishing JR, or any other paper, as the will of the deceased. It does not appear that in this case any attempt was made to satisfy the jury, that it was obtained by fraud, or the exercise of undue influence.

It appears to the court, that a similar objection is to be made to the prayers of the appellee. If it be a question, made so by the proof, whether the paper JR, became, by adoption afterwards, the will of the deceased, or whether it became his will by the act of God, as before stated, the instruction should have informed the jury, what they were to find from the testimony, in regard to it, in order to obtain a verdict, that such paper was

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not what the petitioner alleged it to be. If, from the proof, the jury could find, that it became at any time such last will and testament, there are defects in the prayers of the appellee, because of which the instructions of the court must be decided to be erroneous. A paper, though intended merely as instructions, or a memorandum to enable the scrivener to prepare the will, is to be admitted to probate, if the more formal will be left unfinished, by reason of any act which the law pronounces to be the act of God. 2 *Hag.*, 211. 6 *Eccl. R.*, 330.

There must, however, be a continuance of the intention, down to the time when the act of God intervened, and prevented the deceased from executing his purpose. When there is testimony to authorise a belief that there was no change of his intention, this question should be left to the jury.

To the first prayer it is a fatal objection, that according to it, the paper JR, could not be pronounced by the jury to be the will of the deceased, although the deceased never changed his purpose of so disposing of his property, and was prevented from executing a more formal instrument by his death.

The second declares that it is not to be considered his will, unless it was written by said *Rogers*, *animo testandi*, and intended, as it stood, to be his last will and testament, which, for reasons already given, is erroneous.

The third would take from the jury the power of deciding, *quo animo*, the declarations were made. They might have been intended to escape from importunity.

According to the fourth, the appellee would have been entitled to a verdict, if the testimony satisfied them, that the paper, "JR," was placed by said *Rogers* in the hands of *Gray*, as instructions to prepare a *will*, to be thereafter executed; and although he afterwards adopted it as his will, or was prevented by the act of God from executing a will, in all its provisions the same as the paper of instructions.

The court, therefore, agree with the court below, that the instructions asked by the appellant, ought not to be given; but says there is error in granting the instructions asked by the appellee. The cause is remanded for further proceedings, and a new trial.

CAUSE REMANDED

Ramsay and Jenkins vs. Glass, et al.—1850.

ISAAC RAMSAY AND HUGH JENKINS, EXC'RS OF GEORGE HUTSON, vs. ANDREW GLASS, JOHN GLASS, AND OTHERS.
June 1850.

To entitle an appellant to a reversal of a judgment on the ground of error in the opinion of the court, it must appear to the appellate tribunal, that he has been or may have been injured thereby, and such liability to injury must appear upon the face of the record.

Where the record does not show that any testimony was given to the jury, on which the opinion of the court could have had the slightest operation, the appellate tribunal will regard such opinion as a mere legal abstraction, and no matter how erroneous it may have been, it will constitute no ground for the reversal of the judgment.

The principles of law applicable to the trial of issues from the orphans courts, and of issues to be followed by judgments, are precisely the same.

APPEAL from *Baltimore* county court.

George Hutson died in September, 1846, unmarried and without issue, leaving his mother, *Martha Hutson*, and one of the appellees, *Joseph Hutson*, his brother of the whole blood, and the other appellees, his brothers of the half-blood, besides other brothers and sisters.

On the 22nd of September, 1846, a paper purporting to be the last will and testament of said *George Hutson*, was exhibited to the orphans court of *Baltimore* county for probate.

By this paper, the testator devised to his sister, *Margaret Street*, \$6,000 of city stock. To his uncle, *Isaac Ramsay*, \$5,000 of city stock, and \$5,050 of *Farmers and Planters Bank* stock. To *William A. Swift*, \$1,000 of city stock. To *Samuel Chandler*, \$2,000 of city stock. To *Robert Hutson*, *Joseph Hutson*, *Isaac Glass*, *Andrew Glass*, *Thomas Glass*, *William Glass*, and *John Glass*, each one dollar. All the rest and residue of his estate, real and personal, to be sold and equally divided among *Martha Hutson*, his mother, *Dr. Samuel B. Martin* and *Hugh Jenkins*, share and share alike. He then appoints *Isaac Ramsay* and *Hugh Jenkins* his executors. This paper was signed and sealed by said *George*, in presence of three witnesses, and was on the same day, (22nd

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of September, 1846,) admitted to probate, as his last will and testament, upon the usual oaths of the subscribing witnesses, and letters testamentary granted to the executors therein named.

Afterwards, on the 23rd of March, 1847, the appellees filed a *caveat* against this paper, praying that the probate thereof may be revoked, and the letters testamentary recalled, for reasons sufficiently appearing from the issues afterwards framed. The executors having answered this *caveat*, the following issues were made up and sent to *Baltimore* county court for trial, the appellees being made plaintiffs and the said executors defendants in the trial thereof.

1st. Whether said *George Hutson*, at the time of signing said paper or instrument of writing, purporting to be his last will and testament, was of sound and disposing mind, and capable of executing a valid deed or contract?

2nd. Whether, at the time above mentioned, the said *George* was urged to sign said paper by importunities of the defendants, or either of them, which he was too weak to resist, under circumstances which left him not free to act in the disposition of his estate?

3rd. Whether the signature of the said *George Hutson* to said paper, was his own free and voluntary act, to which he was induced, with a knowledge of the contents thereof, and without the exercise of any undue influence of the defendants, or either of them, which undue influence, in his then situation of body and mind, he was incapable of resisting?

4th. Whether the execution of said paper by the said *George*, was procured by fraud, or fraudulent misrepresentations, by the defendants, or either of them, or by others, acting with their privity or by their direction?

5th. Whether the said *George*, at the time of signing said paper, in the situation in which he was placed, and the circumstances connected with its execution, was capable of knowing its contents, the manner in which it disposed of his estate, and of withholding his assent to the same?

6th. Whether the execution of said paper was procured by reason of undue influences, fraudulent devices, importunities,

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impositions, misrepresentations and deceits, practised by the defendants, or their procurement, on the said *George*?

EXCEPTION. At the trial of these issues the caveators, for the purpose of shewing the mental incapacity of the said *Geo. Hutson*, deceased, at the date of the paper propounded as his last will and testament, produced a competent witness, *Joseph Ramsay*, who proved that he had been well acquainted with deceased in his lifetime for a number of years, and had frequently conversed with him; that deceased, at the age of fourteen, was silly and feeble in intellect, and that his mind became more feeble as he increased in years; that his conversation usually was not connected or sensible. This testimony was admitted without objection, and witness was then asked, whether, upon all his observations, the deceased in his lifetime, and during the term of the witness' acquaintance with him, was or was not, in the opinion of witness, of a sound mind, and capable of making a valid deed or contract? To which question the caveatees objected. The court, (FRICK, C. J.,) sustained the objection, and would not permit the question to be answered. The witness was then cross-examined on the part of the caveatees, and in answer to their inquiries, stated his opinions in regard to the mental capacity of the deceased in general, and to his capacity to execute a power of attorney or bond, and proved, that in his opinion, the intellect of the deceased had become worse since 1843.

Other witnesses were then produced on the part of the caveators, and, in their direct and cross-examinations, were permitted to state their opinions in regard to the mental capacity of the deceased without objection, but subject to the restraint or limit prescribed by the opinion of the court, expressed as aforesaid. The caveators at length produced *George Rogers*, a competent witness, who proved that he had been acquainted with the deceased for several years before his death, and had frequent conversations with him; and he gave in evidence all the particulars, (so far as he could recollect them,) of a conversation between the deceased and witness, in which the deceased attempted to explain a trap or contrivance he had devised for

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catching squirrels; and also stated how he had prevented a squirrel from biting him. The witness was then asked, whether the conversations of the deceased were connected or rational? To which the counsel for the caveatees objected.

But the court overruled the objection, being of opinion, and so declaring, that a witness who had a conversation with the deceased in his lifetime, after detailing that conversation, so far as he recollects, may be required to say whether, in his opinion, such conversation was coherent or otherwise.

To which opinion of the court the caveatees excepted, and this exception the court signed and sealed.

Another bill of exceptions was prepared and tendered by the counsel for the caveatees, which the court refused to sign, but after hearing of the parties, made out a statement of the facts and certified them to the Court of Appeals. This bill and statement relates solely to the competency of *Samuel Martin*, one of the residuary legatees, as a witness on the part of the caveatees, and whether an assignment, proved to have been executed by him at a former trial of the case, must be produced at this trial, or its non-production accounted for. As no allusion is made to this exception in either of the opinions delivered in this case, it is not necessary to state it more at length.

The jury rendered a verdict for the caveators upon all the issues. The caveatees moved for a new trial, because the verdict was against the evidence, and contrary to the instruction of the court, and against the law of the case in other respects. But the court overruled this motion, and the caveatees appealed to this court.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By GWINN and NELSON, for the appellants, and
By THOS. S. ALEXANDER, for the appellee.

MAGRUDER, J., delivered his opinion as follows:

More than one exception is to be found in the record in this

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case. The appellee, however, objected only to what took place while *George Rogers* was under examination. He spoke of various conversations he had had with the deceased, and then of one conversation so far as he could recollect it. Whereupon he was asked, whether the conversations of the deceased were connected or rational? To this the caveatees objected, but the court overruled the objection. No exception was taken to this, nor does it appear what was the answer of the witness, or, indeed, that he did answer the question. Of course we are unable to tell whether, if the question was answered, the caveatees could possibly have been injured by that answer.

The exception, after stating that the court overruled the objection, proceeds: "being of opinion and so declaring, that a witness, who had a conversation with the deceased in his lifetime, after detailing that conversation, so far as he recollects, may be required to say whether, in his opinion, such conversation was coherent or otherwise." To which opinion of the court, the caveatees, by their counsel, prayed leave to except.

In order to set aside a verdict obtained in any case, it must be made to appear to the appellate court, that the court below had given to the jury an instruction which was erroneous, and that by reason of that error the verdict might have been obtained.

As I read this exception, the opinion of the court, of which it complains, is not in truth an instruction to the jury, but a reason for overruling the objection of the caveatees—a reason addressed rather to the counsel than to the jury, and if so, of its correctness this court is not to judge.

It appears, too, in this case, that there were six issues tried, and the verdict of the jury was for the caveators on all of them. The testimony of the witness alluded to may have had some influence upon the minds of the jury, in deciding some of the issues, but there are other issues of themselves fatal to the paper offered for probate. The jury have said that this paper was procured by fraud, and if so, the verdict ought not to be dis-

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turbed, even although testimony only applicable to other issues ought to have been excluded.

Without undertaking then to decide in this case, how far the opinions of witnesses are to be admitted in the trial of issues touching the sanity of a deceased person, I cannot think that in this case, and upon the exception taken as above, this verdict ought to be set aside.

DORSEY, C. J., delivered the opinion of this court.

From the view we have taken of this case, it is unnecessary to examine the question, whether the opinion of the court, as stated in the bill of exceptions, and from which the present appeal has been taken, be right or not? To entitle an appellant to a reversal of a judgment, on the ground that there is error in the opinion of the court, it must appear to the appellate tribunal, that he has been or may have been injured thereby. And such liability to injury must be apparent upon the face of the record. In the record before us no such liability is discoverable. It is not stated that any testimony was given to the jury, on which the opinion of the court could have had the slightest operation. The bill of exceptions does not shew, that any witness gave testimony, on which the opinion of the county court could have had the most remote influence or bearing. It is not stated in the bill of exceptions that any witness testified to the jury, that any conversation which he had with the testator was, in his opinion, "coherent or otherwise." The opinion expressed by the court below, therefore, was a mere legal abstraction, that could not have had any influence on the minds of the jury in forming their verdict, and, consequently, no matter how erroneous the court's opinion may have been, it constitutes no ground for the reversal of its judgment.

To warrant the reversal of the judgment for the reason assigned, this court must assume, without the slightest support from the record for so doing, two essential facts. The first, that a conversation with the testator, detailed by the witness, was, in his opinion, "coherent or otherwise;" and the second fact, that the witness thus giving evidence stated his opinion to

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be, that the conversation was incoherent. If the opinion of the witness had been that the conversation was coherent, and there is nothing in the record to justify a contrary inference, the testimony would have been beneficial, not prejudicial, to the interests of the appellants, and, of course, furnished them no ground of complaint on the present appeal. Such an extraordinary assumption of facts not appearing in the record, to enable an appellate court to reverse a judgment before it, cannot be regarded as a legitimate inference, and is subversive of every principle of judicial courtesy. For it no authority has been produced, and it is not perhaps too presumptuous to say that none can be found. In speaking of this case as one in which the court below have given a judgment; technically speaking, we are not to be, literally, so understood; but we have thus spoken of it for more familiar illustration, the principles of laws applicable to the trial of issues from the orphans court, and of issues to be followed by judgments, being precisely the same.

On the appeal before us the decision of the county court cannot be reversed, and the finding of the jury upon the issues must be sustained.

JUDGMENT AFFIRMED.

CHAMBERS, J., dissented.

CUMBERLAND D. HOLLINS, OF ROB'T, AND CUMBERLAND D. HOLLINS, OF JOHN, vs. DANIEL COONAN.—DANIEL COONAN vs. CUMBERLAND D. HOLLINS, OF ROB'T, AND CUMBERLAND D. HOLLINS, OF JNO.—*June* 1850.

Where two clauses in a will operate upon on the same property, giving it to different devisees, the subsequent clause operates as an abrogation of the former, and the devisee, under such subsequent clause, takes the whole.

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CROSS APPEALS from *Baltimore* county court.

This was an action of *assumpsit*, instituted by *Cumberland D. Hollins of Rob't*, and *Cumberland D. Hollins of Jno.*, against *Daniel Coonan*, for money alleged to be due to the plaintiffs, for the use and occupation of a certain dwelling house, particularly described in the proceedings. The defendant pleaded *non-assumpsit*.

The plaintiffs, at the trial, offered in evidence a duly authenticated copy of the last will and testament of *Cumberland Dugan*, by which the testator disposes of a very large real and personal estate to various legatees. The particular sections of this will having reference to the controversy in this case, are the following:

V. *Item*.—I give, devise and bequeath to my said wife, *Margaret Dugan*, for and during her natural life, all those four three-story houses adjoining each other, situated at, and on the south-west corner of *Market Space*, often called *Cumberland Row*, and *Water* street, the one on the corner fronting about twenty-five feet, on the space or row, the other three fronting on the south side of *Water* street.

XVI. *Item*.—I give, devise and bequeath to my son *Hammond Dugan*, his heirs and assigns, the three-story brick house and lot situate on *Market Space*, commonly called *Cumberland Row*, it being the second house in said row, that is the reversion of the same after the death of his mother.

XXIV. *Item*.—I also devise to my son *Frederick James Dugan*, the reversion in fee-simple, after the death of my wife, who is to enjoy the rents, issues and profits of the same during her natural life, the house and lot designated by the number four, (No. 4,) situate on *Market Space*, on the west side thereof and on the north side, and adjoining the property of the late *Robert Stewart*, the same being about twenty-five feet front, by about sixty-five feet deep.

XXV. *Item*.—I give, devise and bequeath to my son *Frederick James Dugan*, his heirs and assigns, in trust for the use hereinafter mentioned, the following property, that is to say, *my three-story brick house and the lot situate on*

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Market Space or Cumberland Row, after the death of his mother, *the same being the third house in said row, from the corner south of Water street, and on the south side of the house devised to his brother Hammond, the said lot being about twenty-five feet front, and sixty-five feet deep*, in trust for the use of *Cumberland Dugan*, the eldest son of the said *Frederick James Dugan*, to be conveyed to the said *Cumberland Dugan*, in fee-simple, on his attaining the age of twenty-one years. But during the period that shall elapse between the decease of my wife, and the arrival at said age of the said *Cumberland Dugan*, it is my will that my said son *Frederick James Dugan*, his executors, administrators or assigns, shall take and receive all and singular the rents, issues and profits of the said house and lot, to his own absolute use. And if my grandson should die before he attains the age of twenty-one years, I then devise the said house and lot, with all the intervening profits, if any, to my said son *Frederick James Dugan*, forever.

XXVIII. *Item.*—I give, devise and bequeath to my friend *Isaac McKim*, his heirs and assigns, the following property, *in trust* for my grand-children hereinafter named, as follows, that is to say: my three-story brick house, and the lot on the west side of *Market Space, or Cumberland Row*, in the city of *Baltimore*, situate about thirty feet north of *Pratt street*, and between *Baltzer Schoffer's* and *George Kaylor's* lots, it being a front of about twenty-seven feet on the said row, and extending westwardly for depth about sixty-five feet, and also the lot of ground in the rear of said lot, purchased by me from the late *John O. Donnell*, and also, *one other three-story brick house and the lot on the said row or space adjoining the property hereinbefore devised to my son Frederick, the said lot being about twenty-five feet front, and sixty-five feet deep*, which three several pieces of property, I hereby devise to the use of my two grandsons, namely, *Cumberland Dugan Hollins*, son of my daughter *Cordelia Margaret*, and *Cumberland Dugan Hollins*, the son of my daughter *Rebecca*, their heirs and assigns as tenants in common, to be conveyed to

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them by my said trustee, when they respectively attain the age of twenty-one years, and in the meantime in trust to pay over the rents, issues and profits of the same to my wife, during her natural life, if she should live so long, and on the event of her death before my said grand-children attain to the age of twenty-one years respectively, then to pay over the rents, issues and profits thereof to my daughters *Rebecca Hollins* and *Cordelia Margaret Hollins*, equally. And in further trust, to convey the same in fee-simple, should my said grandsons, or either of them die before the said age of twenty-one, that is one moiety to the use of my daughter *Cordelia Margaret*, in fee, if her son dies before the said age, and the other moiety to the use of my daughter *Rebecca*, if her said son should die before he attains to the said age.

The last and residuary clause is as follows:

XXXII. Lastly, all my lands in *Baltimore* county or elsewhere, all my bank, road, insurance or other stocks, (except my *Baltimore and Ohio Rail Road* stock,) all my notes, bonds, mortgages, accounts or other evidences of debts or claims belonging to me. Also my wharf, commonly called "*Dugan's wharf*," extending from the south side of *Dugan's* street, and running north to *Pratt* street. Also, one-half of my said wharf at the head of *Pratt* street, with all and singular my claims, rights and demands for damages appertaining to the same. Also, the reversion of the ten annual ground rents on *Dugan's* wharf, of about nine hundred dollars per annum, after the death of my wife. Also, all the ground rents out of which the said rents issue. Also, all the rest, residue and remainder of my estate, real, personal and mixed, I give, devise and bequeath to my four children, namely, *Rebecca Hollins*, *Cordelia Margaret Hollins*, *Hammond Dugan* and *Frederick James Dugan*, in the manner following, that is to say: one-fourth part of the said entire residue, I devise to my said trustee, *Isaac McKim*, his heirs and assigns, in trust for the sole and separate use of my daughter *Rebecca Hollins*; one-fourth to my said trustee in fee, for the use of my daughter *Cordelia Margaret Hollins*, the said two parts to be subject to

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the same limitations, uses and trusts, as are heretofore declared in respect to the other property devised to my said trustee in trust for my said daughters; and the remaining one-half of the residue of my estate, I devise to my sons *Hammond Dugan*, and *Frederick James Dugan*, to them forever, to be equally divided, share and share alike.

It was admitted by the parties that this suit was instituted for the purpose of trying the title to the house and lot in the possession of the defendant as tenant of the testator, and of which said testator died seized, that one quarter's rent was due thereon; and that said house and lot is a three story brick house, and the lot on the west side of *Market Space*, in the city of *Baltimore*, and that it is the third house and lot south of *Water street*, and the third house and lot in *Cumberland Row*, marked No. 3, in the following plot, being a copy of a portion of the plat filed with the original record:

ORIGINAL PLAT.

WATER STREET.			
Yard.	Back-building.	96 No. 1.	24.6
		No. 2,	24.6
		96 No. 3. Lot in dispute. 26	24.6
		No. 4.	26.6
65			
Lot sold by Dugan to Robert Stewart.		36.6	
65 Feet.			

MARKET SPACE, OR CUMBERLAND ROW.

MARKET SPACE, OR CUMBERLAND ROW.

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It was further admitted that before the institution of this suit, and the accrual of the rent sued for, the plaintiffs, (who are the *cetuis que trusts* mentioned in the 28th clause of the will, under which clause they claim the whole house and lot in controversy,) and each of them had attained the age of twenty-one years, and had received a deed from *John Speur Smith*, (who was regularly appointed by the chancellor trustee in the place of *Isaac McKim*, mentioned in the will, who declined to accept said trust, for the house and lot in question, under their construction of the will. But the sufficiency of said deed to give them the title, was not admitted.

Upon this evidence and agreement, the plaintiffs prayed the court's opinion to the jury, that if they find the facts admitted, the plaintiffs are entitled to recover. But the court (ARCHER, C. J.,) refused to grant said prayer, and the plaintiffs excepted.

The defendants then prayed the court to instruct the jury that according to the true construction of the will of *Cumberland Dugan*, offered in evidence, the plaintiffs are not entitled to recover in this suit. But the court refused to grant said prayer, and the defendants excepted.

But the court instructed the jury that by the true construction of the will of the said *Cumberland Dugan*, the plaintiffs were each entitled to one-third part and no more, of the house and lot in the possession of the defendant, and of the rent payable therefor by him, the said house and lot being situate in *Cumberland Row*, in the city of *Baltimore*, on the west side of *Market Space*, and being the third house south of *Water street*. To which instruction, the plaintiffs and defendant each excepted, and the verdict and judgment being for plaintiffs, each appealed to this court.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MARTIN and FRICK, J.

J. M. CAMPBELL for the plaintiffs below, contended that the devise to them in the *latter* part of the will, being repugnant to the devise to *Frederick J. Dugan*, in the *earlier* part of it, must prevail over the one which precedes it.

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T. P. SCOTT for the defendant below, insisted that the court erred in refusing defendant's prayer, and in giving the instruction which was given, for these reasons:

1st. Because there is no *direct* revocation of the devise in the 25th section of the will; and the description of the property in the 28th sec., is too vague, indefinite and uncertain, to operate as a *constructive* revocation of the devise in the 25th sec.

2nd. Because such an interpretation of the 28th sec. of the will, as would operate as an implied revocation in whole or in part of the 25th sec., would be a construction of the will in violation of the *general* intent of the testator to provide for all three of his grand-sons named after him, as well as of the *particular* intent to provide for *Cumberland Dugan*, of *Frederick*, as declared in the 25th section of the will.

3rd. Because by a different construction of the said 28th sec. of the will, viz: by substituting the name of "*Hammond*," for the name of "*Frederick*," in the description of the boundaries of the property intended to be devised by that section, effect will be given to every section of and devise in the said will, and will be consistent with the general intent of the testator without violating any special intent.

4th. Because if the 28th sec. of the will does in any degree change or revoke the devise in the 25th sec., it is only to the extent of a moiety of the property so devised.

The court, (CHAMBERS, J., dissenting,) upon the record and plat then before them, decided that the word "*Frederick*," in the 28th section of the will, should be stricken out, and the word "*Hammond*" inserted, making that section read as if the testator had devised to *J. McKim*, in trust for the *cestuis que uses* therein named, his "three-story brick house and lot on *Cumberland Row*, or *Market Space*, adjoining the property hereinbefore devised to his son '*Hammond*.'" This construction would make the house and lot on the corner marked No. 1, pass by the 28th sec., and was based chiefly upon the ground that there was a mistake made by the testator in the fifth section of his will, in describing the three houses therein mentioned, as fronting on "*Water street*," instead of *Cumberland Row*, the plat not showing that there were

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any houses fronting on *Water* street, except the one at the corner, marked No. 1. In conformity with this decision, an opinion was delivered by MARTIN, J., which was superseded by the one below, delivered by the same judge, and by his directions is not to be reported.

After this decision was made, a motion was entered for a re-argument of the cause, and the following plat filed, showing that there were three houses fronting on *Water* street, which were admitted to have been owned by the testator at his death, and erected by him before the execution of his will.

PLAT MARKED DC.
WATER STREET.

24.6 Three-story brick house. 9.81	Three-story brick house. 9.81	Three-story brick house. 9.81	96 No. 1. 24.6
65 Feet.			26 No. 2. Devised to Hammond Dugan. 24.6
			26 No. 3. In dispute. 24.6
			26 No. 4. Devised to Frederick J. Dugan. 26.6
Lot sold by Dugan to Robert Stewart. 65 Feet.			36.6

MARKET SPACE, OR CUMBERLAND ROW.

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MARTIN, J., delivered the opinion of a majority of the court.

Since the opinion delivered in these cases by a majority of the court, a plat has been filed in the cause by the counsel for the defendant, marked CD, and admitted by both parties to be correct, from which it clearly appears, that the late *Cumberland Dugan* was the owner of three three-story houses, fronting on the south side of *Water* street. And it has been admitted by the counsel for the defendant, in his letter of the 22nd of March, 1850, filed in the cause, that these houses were erected by the testator prior to the execution of his will. Under such circumstances, it is impossible to contend, there was a misdescription of the property designated by the testator in the fifth clause of his will. The court, therefore, all concur in the opinion, that the testator is not to be considered as having committed a mistake in the 28th clause of his will, and that the 25th and 28th sections are to be construed as operating upon the same property.

The question, then, arises, whether the 28th clause is to be regarded as an abrogation of the 25th clause of this will, or do the devisees mentioned in the two clauses, take concurrently?

Upon this question there is a difference of opinion among the members of this court. Three of the judges being of opinion that the 28th clause operates as an abrogation of the 25th clause, and that the property in contest, is therefore devised by the 28th clause to the plaintiff's below. Two of the judges being of opinion, that the trustees named in the 25th and 28th clauses of the will, take concurrently, each trustee taking a moiety of the property in dispute, for his *cestui que use*.

This court is therefore of opinion, that the county court erred in refusing the plaintiff's prayers, in the instruction given by them to the jury, and were correct in rejecting the defendant's prayer.

It is proper to state before leaving the case, that the majority of the court, in determining that there was a mistake in the 28th clause of this will, (for the reasons stated in their opinion,) on the supposition that the testator had misdescribed the proper-

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ty intended to be devised by the *fifth* clause, acted upon the record in its then imperfect condition. It appeared from the plat, forming a part of the record as it then stood, that there were no houses on the south side of *Water* street; and with this plat before them, they thought it demonstrably clear from the terms of the will, that the property which the testator designed to give to his wife, for life, by the 5th clause, was the house at the corner of *Water* street and *Cumberland* row; and the three houses, Nos. 2, 3 & 4, on that row; that the testator meant, that the 5th, 16th, 24th & 25th sections of his will should operate upon the same property.

By the plat recently filed, designated as DC, and the admissions of the counsel, it is beyond controversy, that the testator was, at the date of the will, the proprietor of three three-story houses, fronting on the south side of *Water* street; and there is, of course, no room for the argument, that there was misdescription in the fifth clause.

In the case of *C. D. Hollins of Robert, and C. D. Hollins of John, vs. Daniel Coonan*, the judgment of the county court is reversed. And in the case of *Daniel Coonan, vs. C. D. Hollins of Robert and C. D. Hollins of John*, the judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

HENRY S. MITCHELL, ADM'R D. B. N., C. T. A. OF JAMES MITCHELL, vs. JULIANNA WILLIAMSON, GEORGE W. WILLIAMSON, ADOLPHUS WILLIAMSON, EX'RS OF DAVID WILLIAMSON, JR.—*June* 1850.

Where a suit is brought against an executor who dies after nar filed, and the admn. d. b. n. c. t. a. is made a party, it is not necessary to file a new nar.

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Where under leave to amend and plead *de novo*, new pleas are filed, those before in the case are, of course, withdrawn.

When a plaintiff takes issue in fact upon an allegation not constituting a legal bar to his action, he cannot ask the court to rule out testimony in proof of such allegation.

The act of 1826, ch. 247, does not dispense with the necessity of a full record, as evidence of a judgment in any case, in which, before that act, a full record was necessary.

APPEAL from *Charles* county court.

This was an action of *debt*, instituted on the 16th of March 1838, by the appellees, executors of *David Williamson, Sen.*, against *Elizabeth Mitchell*, executrix of *James D. Mitchell*, upon a bond for \$2000, executed by *David Williamson, Jr.*, as principal, and said *James D. Mitchell* as surety, on the 17th of August 1833, and payable to the plaintiffs as executors as aforesaid, within two years from date.

After the nar was filed and before plea, the executrix died, and the appellant, *Henry S. Mitchell*, the admr. d. b. n. c. t. a., was ruled to appear and defend the action. The nar filed against the executrix, was the only one filed in the case. The appellant then appeared and after several imparlances, pleaded:—1st. Payment. 2nd. *Plene administravit*. 3rd. That said *J. D. Mitchell*, signed the bond as surety of said *David Williamson, Jr.*, and died on the 1st of June 1838: and that said *David* died on the 1st of January, 1839, and *Maria Williamson*, his executrix, proceeded to settle up his estate, and on the 15th of March 1839, gave the notice required by law to creditors to file their claims, which was duly published, and that said executrix had sufficient assets to pay said debt; but the plaintiffs did not present the said bond as required by said notice. That said executrix on the 19th of October 1844, passed a final account and has distributed and paid away all the personal estate of her testator, without notice of this bond. And so this defendant saith, that by the laches and default of the plaintiffs, the estate of the said *David* is wholly exonerated and discharged of any liability for said bond, he therefore prays judgment if the said plaintiffs ought to have or maintain their aforesaid action against him, as admr. d. b. n. of the said

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James D. Mitchell, &c. 4th. That the plaintiffs never were executors of said *David Williamson Sen.*, deceased.

The plaintiffs then took issues upon the 1st and 2nd pleas, and demurred to the 3rd and 4th. The defendant then joined in demurrer, but afterwards withdrew the joinder as to the third plea, and asked leave to amend the same, and answer anew to the declaration. He then filed an amended plea, the same as the *third* with but slight verbal alterations. The plaintiffs then replied, and traversed the said *third* plea as amended; and upon this traverse issue was joined. The court then gave judgment on the demurrer to the 4th plea, for the plaintiffs; but this was afterwards stricken out, and the plaintiffs, upon leave granted, replied, and traversed the 4th plea, by averring that they were the executors of *David Williamson, Sen.*, and on this traverse issue was joined.

After this the defendant asked leave to amend his pleadings, and answer anew, which being granted, he pleaded, 1st. *Plene administravit*

2nd. That said *J. D. Mitchell*, in his lifetime, was indebted unto one *Sarah E. Mitchell*, in the sum of \$5,000, with interest, for a legacy or bequest, chargeable to said *James*, in and by the will of *F. J. Mitchell*, deceased, which is still due to said *Sarah*. And further, that since the death of said *James*, one *Ann M. Mitchell*, as adm'r of *J. T. Mitchell*, recovered against defendant, as adm'r of said *James*, a judgment, which still remains unsatisfied. And defendant saith, that he hath fully administered all, &c., the goods and chattels which came to his hands, as adm'r *d. b. n.* of said *James*, except goods, &c., of small value, viz: of the value of \$20, and hath not, &c., any goods of the said *James* in his hands to be administered, except the goods and chattels of the value aforesaid, which are not sufficient to satisfy the several debts aforesaid, and which are subject and liable to satisfy said debts, together with the debt due to the plaintiffs, &c.

3rd. That said bond was executed by said *James*, as surety for *David Williamson*, and was made to secure the payment of a judgment, which plaintiffs had recovered against said *Da-*

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vid, in *Harford* county court, and that after its execution, viz: on the 3rd of October, 1835, *Adolphus Williamson*, one of the plaintiffs, by his release of that date, did release unto said *David* all his interest in said judgment, being one-ninth part thereof. And further, that before the bringing of this suit, viz: on the 1st of August, 1835, said *David*, the principal in said bond, for the purpose of further securing the payment of said judgment, conveyed to plaintiffs and *Joseph M. Williamson*, all his right in certain lands in *Louisiana*, of the value of \$50,000; and afterwards, on the 1st of October, 1835, said *Adolphus*, one of the plaintiffs, by his release of that date, did release and convey to said *David*, one undivided fourth part of a fifth part of said lands, which said fourth part was sufficient in value to have paid and satisfied said bond. And further, that after the rendition of said judgment and making of said bond, viz: on the 20th of August, 1833, *Juliana Williamson*, one of the plaintiffs, by release of that date, did release all her interest in the debt due by said *David* to the plaintiffs. By all which actings and doings defendant saith, that said *James*, as surety aforesaid, was wholly discharged and exonerated from said bond, before the bringing of this suit, and this he is ready to verify, &c.

4th. That before the service of the writ in this cause on the defendant, he caused to be published a notice to creditors according to law, but plaintiffs did not present their claims as thereby required.

The defendant again asked leave to amend, and filed the same four pleas as before, with an additional one, 5th, that plaintiffs, before bringing suit, did not demand payment of the bond from said *David Williamson*, although he was then alive. He then asked leave to file an additional plea, which being granted, he filed his 6th plea, that the bond was given to secure the payment of money upon an usurious contract, made on the 7th of August, 1833, between the plaintiffs and the obligors, whereby more than six per cent. interest was reserved, contrary to the act of Assembly in such case made and provided, &c.

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The plaintiffs traversed all the facts averred in these six pleas, and took issue thereon, in which the defendant joined.

1ST EXCEPTION. The plaintiffs read the bond on which suit was brought and then rested. The defendant then introduced the will of *F. J. Mitchell*, dated 18th of March, 1825, in which the testator desired his son, the said *J. D. Mitchell*, to release to his sister, *Sarah E. Mitchell*, his interest in certain lands held by them in right of their mother, “or in lieu thereof, pay to said *Sarah* the sum of \$5,000, lawful money, for and with the payment of which said sum of \$5,000, in the case of his refusal or omission to release and relinquish aforesaid, I do hereby charge that portion of my estate and property so devised and bequeathed, to said *J. D. Mitchell*, for his own use and benefit.” (Other parts of this will are omitted, as the pleadings do not state any questions arising upon them, and the whole will will be found set out in the case of *Mitchell vs. Mitchell*, 2 Gill, 230.) The defendant further proved, that *J. D. Mitchell* received under this will real and personal estate, to a much larger amount than \$5,000, and died in August, 1837. That said *Sarah E. Mitchell* brought suit against his executrix in 1840, to recover the sum of \$5,000, mentioned in said will, to which limitations were pleaded, and an entry of *non pros.* made, because the counsel had mistaken the form of action. Upon this evidence, admitted without objection, the defendant asked the court to instruct the jury, that it was competent for them to consider the said sum of \$5,000, with interest from the death of said *J. D. Mitchell*, as a debt chargeable against the assets of said *J. D. Mitchell*, in the hands of defendant, as adm'r *d. b. n.*, but the court, (MAGRUDER, C. J., and DORSEY, A. J.,) refused to grant this instruction, and the defendant excepted.

2ND EXCEPTION. This exception was taken by the defendant, to the refusal of the court to permit him to read a power of attorney, executed by *Juliana Williamson* to *Charles Williamson*, to execute for her the release, and said release executed in pursuance thereof, referred to in the third plea, having first proved the execution of said power of attorney, and also

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of the release, the latter being proved by showing, that the signature of *Juliana Williamson* was in the handwriting of *Charles Williamson*, the nominee in said power of attorney.

3RD EXCEPTION. The defendant to sustain the plea of usury, offered to read a certified short copy of the judgment and docket entries in the case of the plaintiffs, as executors of *David Williamson, Sen.*, against *David Williamson, Jr.*, in *Harford* county court, but the court, on motion of the plaintiff's counsel, rejected the evidence so offered, and defendant excepted.

The verdict was for the plaintiffs on all the issues. The defendant moved in arrest of judgment, because the proceedings were wholly irregular, but the court overruled this objection, and rendered judgment for the plaintiffs, and the defendant appealed.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MARTIN and FRICK, J.

By ROBERT J. BRENT for the appellant, and
By CAUSIN for the appellees.

CHAMBERS, J., delivered the opinion of this court.

It has been very correctly said by the appellants' counsel, that the confused state of the record in this case, makes it very difficult to ascertain what are the questions properly before the court.

We will express an opinion on such points as we suppose, after an examination of the record, and a consideration of the argument, may be properly regarded before us.

The motion to arrest the judgment has been argued on two grounds : first, that in such a case as this, where a suit is instituted against an executor, who dies, *pendente lite*, after *nar* filed, when the administrator *d. b. n., c. t. a.* is made party, a new *nar* is necessary. The act of 1785, chap. 80, authorises the court to order new pleadings when they deem it necessary, in cases where representatives are made parties; but it is by no means required, in all cases, and in this would have been perfectly useless.

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The second ground is, that the court gave judgment on demurrer, to one of the pleas, for plaintiff, which was afterwards stricken out; and that no further action was had in reference to the plea. This is a mistake on the part of the counsel, for the record shows there was a replication to that plea, and it further shows, that afterwards the defendant had leave to amend his pleadings, and plead anew to the bar, and of course all the previous pleas of defendant, and the replications thereto were withdrawn. Indeed, one cause of the confusion prevailing in this record arises from the repetition, time after time, of the same pleas after applications to amend and plead *de novo*, which application was made three several times. When, under leave to plead *de novo*, new pleas are filed, those before in a cause are, of course, withdrawn.

The first exception was taken to the refusal of the court to instruct the jury, that the evidence offered tended to prove a debt of \$5000, to be due from *J. B. Mitchell's* estate. We do not perceive that the matter alleged in the plea stating that fact, proved any legal defence or a bar to the action. The plaintiff however had taken issue in fact upon that plea, and so far as the evidence offered went, it was precisely in conformity to the allegations of the plea, and so far calculated to prove it. When a party takes issue in fact upon an allegation not constituting a legal bar to his action, he cannot successfully ask the court to rule out testimony, if it be in proof of such allegation. The devise of *Francis J. Mitchell* to *J. D. Mitchell* of a large real estate, and the direction that *J. D. Mitchell* should pay his sister \$5000, certainly created a debt. It has been said this court decided it was a lien on the estate devised to *J. D. Mitchell*, and lost or merged by the fact that the sister before the payment of the money, became entitled by inheritance from *J. D. Mitchell* to the land charged, 2 *Gill* 230. But it must be remembered that, although by the will it appears to have been a charge upon the real estate devised, it was not for that reason the less a debt due by *J. D. Mitchell*, and the facts which induced this court to say the debt merged, were not in this case replied by plaintiff in answer to the plea,

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nor given in evidence to take away the force of the proof offered by defendant. We can only regard the case made in the plea and proof, are as the latter was in conformity to the plea, we must say the court should have admitted it. The question raised by the second exception seems to be, whether the defendant could read to the jury the letter of attorney from *Juliana Williamson*, one of the plaintiffs, to *Charles A. Williamson*, authorising him to execute the release, for her proportion of the debt due from *David Williamson*, and the release executed pursuant to said letter of attorney, the due execution of each of these papers having been first proved. To ascertain the propriety of reading these papers to the jury, it is necessary to ascertain whether they were relevant to the issue framed. The appellee's counsel has urged that the release related to another debt, but it will be found that it is so set forth in the plea on which issue is taken. It is also objected that its legal effect is not to discharge the debt for which the action is brought; but if that is the case, the proper course would have been to demur to the plea, and not to deny the allegations. We do not intend to intimate that the facts pleaded amount to a legal bar, or that if a release of the debt sued for was claimed, the plea correctly brings that question before the court. A plea should not set forth the evidence, and deduce argumentatively therefrom a legal conclusion, but if the particular circumstances constituting in law a release or other matter of defence, are thus alleged, and the adverse party takes issue on these allegations, he cannot require the court to rule out testimony which goes to prove the particular allegations in the plea.

The third exception was taken to the refusal of the court to admit a copy of the docket entries from the clerk of *Harford* county. There is nothing in this case to exempt the party who desired to offer proof of the character and nature of the judgment in *Harford* county, from producing the usual proof, a full copy of the record. The act of 1826, ch. 247, authorises the clerk to make up his full record from his docket entries, and minutes, instead of resorting to the record or transcript, which before that act was required to be made of every judg-

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ment, but it does not dispense with the necessity of a full record as evidence of a judgment, in any case in which, before that act, a full record was necessary. The opinion of the court below is therefore affirmed on the third, and reversed on the first and second exceptions.

JUDGMENT REVERSED, AND PROCEDENDO.

HEZEKIAH G. HAYDEN vs. H. D. BURCH AND WIFE, ET AL.—June 1850.

A father purchased land and paid for it with his own money, but had the title conveyed to his son, who entered into possession and disposed of it as his own property. HELD: that the money advanced, being for the purchase of land, must be treated as land, and this transaction must be regarded as an advancement in real estate.

With the real estate of the deceased, when and how he has disposed of it to his children, the orphans court has no concern: controversies with regard to real estate, must be settled in a different *forum*.

The position that the distribution of realty with personalty in *hotchpot*, is a legal or proper subject for the action of an orphans court, is not sanctioned by authority.

The acts of Assembly, from which the orphans courts derive their powers, restrict the action of those courts in cases of intestacy, entirely to the personal assets; none of them confer any jurisdiction over the realty,

The provision of the act of 1798, which requires the settlement or portion advanced in the lifetime of the intestate, to be brought into *hotchpot*, can be applied only to a case of total intestacy.

APPEAL from the orphans court of *Saint Mary's* county.

The appellees, heirs and distributees of *Peregrine Hayden*, deceased, filed their petition in the orphans court of *Saint Mary's* county, on the 6th of December, 1849, charging that the appellant, who was one of the sons and distributees of the deceased,

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had received large advancements from his father in his life time, which they pray may be deducted from his distributive share of the deceased's personal estate, all of which the appellant denied by his answer.

Testimony was then taken, by which it was proved that the intestate purchased a tract of land for \$1800, and paid for it with his own money, but had the title conveyed to his son, the appellant, by a deed from the parties in whom the legal title was vested, dated 3rd of March 1832. It was also proved, that in 1824, his father gave the appellant several negro slaves. It was further proved, that the father gave up to the appellant, the latter's note, which he held for \$1000, but it was shown that this was done by the father in consideration of valuable services his son had rendered him. A will of said *Peregrine Hayden* was also exhibited, executed on the 29th of February, 1848, in presence of two witnesses, confirming freedom to certain negroes therein named, whom he devised to the appellant, in trust, to receive their freedom whenever they shall determine to emigrate to a free state or to *Liberia*, but should they determine to remain in this State under existing laws, the appellant was still to hold them in trust, to aid them in their support, and permit them to live on testator's land free of rent. This will also states, that having executed a deed of manumission to said slaves, "it is my wish, in the event of the said deed proving inadequate to secure their freedom, that this my will and testament may take effect for the object and purpose herein declared and set forth."

Upon this testimony, the orphans court passed a decree on the 21st of March, 1850, that the appellant should be charged with the value of the negro slaves advanced to him by his father, but declined to make any allowance on account of the land, for want of jurisdiction, and rejected the charge on account of the notes. From this decree the appellant took an appeal.

The cause was argued before DORSEY, C. J., MAGRUDER, MARTIN and FRICK, J.

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By THOS. S. ALEXANDER for the appellant, and
By CAUSIN for the appellees.

FRICK, J., delivered the opinion of this court.

The decision of the question submitted in this case, depends upon the construction of the acts of Assembly in relation to the estates of deceased persons, and the powers conferred by them upon the several orphans courts of the State.

The intestate, the father of the appellant, in his lifetime, bought the land in question for \$1800. By his consent and direction, the deed of conveyance was made to the son, who passed into possession of the land, and held and disposed of it afterwards as his own property. The entire purchase money was paid by the father. The proceedings among the parties by which the sale was perfected, are fully detailed in the record, and recited in the deed, and although somewhat complicated, indicate that the course adopted was to avoid a circuitry of deeds, and to secure a direct conveyance to the person who should be entitled to receive it. It is sufficient for the purpose of the present inquiry, that the father bought the land and paid the money, but the son received the title.

It has been urged in argument that the transaction should be regarded as an advance of money on the part of the intestate, and to the extent of the sum advanced, it is claimed that the amount should be abated from the appellant's distributive portion of the personal estate. So to regard it, would obviate all further inquiry and the appropriation of it in the form indicated, would be the necessary consequence. But our conclusion from the facts in the record are different, and requires us to pronounce it an advancement in real estate. The father did not advance the money to the son to buy the land, but bought it himself from *Key*, the grantor in the deed. But the land being designed for the son, it would have been a needless and superfluous act, to take the conveyance to himself and then convey to the son. Besides there were other preliminaries in relation to a previous exchange of lands, more fully explained in the record, which necessarily precluded the execution of any

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conveyance. These being adjusted according to the understanding of all parties, the conveyance, as the simplest mode of carrying out the design of the intestate, was executed directly to the beneficiary, the appellant. From him no other or additional consideration than the nominal one passed to the grantor. Were it otherwise, still the money advanced being for the purchase of land, must, in such case, be treated as land. We entertain no doubt, however, that it was the manifest design of the intestate to bestow land and not money. That the title was never in him, and was made to pass from a stranger to the grantee, does not vary the legal import of the transaction. It must be regarded as an advancement of real estate. So treating it, it has been further urged in argument, that there is nothing which forbids the orphans court from dealing with it, as an advancement to the appellant, and abating the value from his distributive share of the personal estate. But the recent decision of this court in the case of *Patterson's heirs*, 8 Gill, 46, decided upon the eastern shore, precludes all further questions on this point. It is there said, that "with the real estate of the deceased, when and how he has disposed of it to his children, the orphans court have no concern. Controversies with regard to the real estate must be settled in a different *forum*." Nor does the decision in the case of *The State, use of Wilson, vs. Jameson*, in 3 G. & J., 442, cited by the counsel for the appellees, contravene this proposition. That was an action *in the county court* by the distributees, upon the bond of the administrator, in which it was attempted to set off an advancement by the intestate in his lifetime, by a gift of real estate. Although it is intimated there, that in a proper form of pleading it might be used in that court as a bar to the action, yet it is announced decidedly by the court, that the proper *forum* for relief in all such cases, is in a court of chancery, where the respective rights of all may be adjusted agreeable to the rules of equity. And in the case cited from 5 H. & J., 459, *Warfield vs. Warfield*, no reference is had to the personal estate of the intestate; and in that aspect only, confirms the position that the true *forum* for relief against an

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alleged advancement of real estate, is a court of equity. The assertion that the distribution of the realty with the personalty in *hotchpot*, is a legal or proper subject for the action of an orphans court, is not supportable by these cases, nor is it any where sanctioned by authority. The several acts of Assembly from which the orphans courts derive their powers, restrict the action of those courts in cases of intestacy, entirely to the personal assets. None of them confer any jurisdiction over the realty.

So far then as the action of the orphans court of *St. Mary's* county is concerned upon this branch of the case before them, they were right in declining to act upon it. But there is also a state of the case further disclosed in the record, which equally forbids their treating any portion of the personal estate as an advancement. The act of 1798, which requires the settlement or portion advanced in the lifetime of the intestate, to be reckoned in the surplus, contemplates in the judgment of this court, a total intestacy. And however meagre the provisions of the paper may be which is produced as the will of *Peregrine Hayden*, it must nevertheless be construed as a disposition of a portion of his estate. It purports to give or to confirm the freedom bestowed upon certain slaves by a deed of manumission previously executed by him, and which this will, by a trust provision in it, purports to secure to them in "the event of the deed proving inadequate to secure it." It contains no other disposition, unless the contingency upon which the support of these negroes is there required, be considered a charge upon his real estate. No executor is named, nor is reference made to any other property which he owned at the time. And if a deed of manumission had been produced to satisfy the court that in all respects it was adequate to secure the proposed freedom of these negroes, we should hesitate to pronounce it a will, in view of the act of Assembly. In that event it could be but an asserted control over property with which he had already parted, and over which he had no testamentary disposition. But in the absence of any means of testing this alleged manumission, with his own doubts expressed as to its effica-

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cy, it is not for this court to say that it legally divested him of all property in these slaves. And if it does not, this will is a partial disposition of his property, which avoids the intestacy contemplated by the act of 1798. By that act the surplus is constituted of *the whole estate*, after the payment of debts and the advancement charged is directed to be reckoned in the surplus. We are not at liberty to depart from the express provisions of the act which it is here manifest contemplates a total intestacy. By any other construction, the disposition of three-fourths of an estate, by will, would still leave a surplus, in common acceptance, and every such case of a residuum, would constitute an intestacy. But the provisions of the act can only be applied to a case of total intestacy. And the will before us, for the reasons stated, being operative, and constituting a partial disposition of property by the testator, we are compelled to decide, that the case presented to the court below was not within the act, and so far as their decree abates any portion from the appellant's share of the personal estate, we are bound to *reverse it*. In the remainder of the decree we concur.

DECREE REVERSED AND PROCEDENDO.

FRANCIS H. SMITH AND WILLIAM A. TALBOTT, vs. JAMES L. L. DONNELL, EX'CR OF SUSAN PARKER.—*June* 1850.

A testatrix devised by her will, the residuum of her estate to her nephews and nieces, "share and share alike." Subsequent to the execution of this will, she advanced large sums of money to one of the residuary legatees, who, prior to the death of the testatrix, received the benefit of the insolvent laws, and his permanent trustee was duly appointed. **Held:**

That in paying this legacy, the executor had the right and was bound to discount therefrom the loans made to the legatee by testatrix subsequently to the date of her will, and this balance alone passed to and could be recovered by the trustee in insolvency.

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Under the fifth section of the act of 1805, ch. 110, no more of a devise or bequest could be obtained by creditors, than could have been obtained by them if no insolvent discharge had intervened. The devise vested not in the trustee, but remained in the insolvent debtor, subject to the race of diligence on the part of his creditors.

The second section of the act of 1834, ch. 293, designed to accomplish nothing but to put an end to this race of diligence amongst creditors, by transferring to the trustee such rights as would otherwise have remained in the insolvent, and thus secure an equal distribution of his property.

APPEAL from the orphans court of *St. Mary's* county.

Susan Parker died in 1848, leaving a will, executed on the 27th of February, 1843, by which, after sundry legacies, she declared: "It is further my will and desire, that the rest and residue of my estate and property, after satisfying said gifts and bequests as aforesaid, shall be divided among such of my nephews and nieces, the children of my brother *Isaac*, and of my deceased brother *Charles*, and sisters *Margaret* and *Sally*, as shall be living at the time of my death, that is to say, to each nephew and niece, share and share alike."

On the 17th of *September*, 1849, the appellee, her executor, filed a petition in the orphans court, stating that he had paid the debts and had a balance of the estate in his hands for distribution; that *Francis H. Smith*, one of the residuary legatees in the will, was, at the time of the death of the testatrix, indebted to her for money advanced from time to time, in the sum of \$8,000. That subsequent to said advances, viz: in January, 1846, said *Smith* became an applicant for the benefit of the insolvent laws, and received his final discharge on the 21st of August, 1846, and that *William A. Talbott* was appointed his permanent trustee. That said *Smith* would be entitled to about \$1,000, as his distributive share of said personal estate, but that petitioner is advised that he ought not to pay over any part of this sum to him, but that the same should be set off against an equal amount due by him as aforesaid to the estate of said *Susan*.

The answer of *Smith* admits the facts stated in the petition, but claims to have been discharged from his debt to the testatrix, under his application for the benefit of the insolvent laws.

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The answer of *Talbott* relies upon the same defence and claims, that he, as such trustee, is entitled to receive whatever portion of said estate *Smith* may be found entitled to, and that the executor cannot apply such portion to the payment of a debt, which said *Smith* is not in any way bound to pay or liable for.

The orphans court was of opinion, that the executor ought not to pay over any portion of said estate to *Smith* or to *Talbott*, as his trustee, until the debt due by *Smith* to the testatrix shall have been fully satisfied and decreed accordingly. *Smith* and *Talbott* appealed.

The cause was argued before DORSEY, C. J., MAGRUDER and FRICK, J.

By TALBOTT for the appellants, and
By KEMP for the appellee.

DORSEY, C. J., delivered the opinion of this court.

The testatrix in this case made her will in 1843, and after giving a few legacies to other persons, gave the rest and residue of her estate to certain of her nephews and nieces, "share and share alike." After the making of her will, and before the year 1846, she made loans of sundry sums of money to *Francis H. Smith*, one of the appellants, and also one of her nephews and residuary legatees. She died in 1848, leaving her will in full force. In 1846, *Francis H. Smith* obtained the benefit of the insolvent laws of *Maryland*, and *William A. Talbott* was duly appointed his permanent trustee, and the only question we are called on to decide is, shall this trustee receive the full amount of the legacy to the insolvent, without any deduction therefrom of the loans made to him by the testatrix? But for the insolvent discharge of the legatee, there cannot be a doubt, either upon reason or authority, that the executor of the testatrix, upon the legatee's insolvency in point of fact, would have had a right, in paying the legacy, to have set off therefrom the loans to the legatee. In arriving at the intention

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of the testatrix in the construction of her will, in reference to the bequest in question, we are bound to assume, that she knew that in paying the legacy to the insolvent legatee, her executor had the right, and was in duty bound to discount from the legacy any loans she might make to the legatee, subsequently to the date of her will. In construing her will, therefore, we must presume it to have been her intention, at the time of its execution, that such deduction, if an occasion for it arose, should be made. Every principle of natural justice and reason would rise up in opposition to the assertion of the principle, that an assignee of this legacy should hold it discharged from this right of set off. Unless contravened by some clear and positive provisions of law, the bounty of the testatrix must be accepted pursuant to her apparent intention, as collected from the face of the will. That such intention would not be violated by gratifying the claim of the appellant, credulity itself cannot believe. The will, in the most explicit terms, declaring, that the "rest and residue" of the estate of the testatrix shall be divided amongst the specified nephews and nieces, "to each share and share alike." According to the principles contended for by the appellants, the nephew, *Smith*, after receiving from the testatrix in her lifetime the full amount of his legacy, is again to receive through his trustee the same amount, to the manifest prejudice of his co-legatees. If the provisions of the will itself had not excluded all such construction of the testatrix's will, the nature of the case would, unquestionably, do so. In giving this legacy, who was the peculiar object of the testator's bounty? The legatee himself. Can any rational mind be induced to believe, that it was intended that the legatee, in the event of his receiving and enjoying the legacy, could only take that which was given him in express terms by the will, but if his legacy were transferred to his creditors, in the event of his insolvency, that they, notwithstanding the legacy had been previously fully satisfied by loans made to the legatee by the testatrix in her lifetime, should receive the entire amount of the legacy, in the same manner as if no previous satisfaction of it had ever been made to the legatee?

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And from what fund is it that this payment to the creditors is to be made? Out of that which she has most unequivocally given to her co-residuary legatees, her nephews and nieces. To perpetrate such an act of flagrant injustice, no court of justice could be induced to lend its sanction, unless controlled by the clearest expression of the legislative intent, evinced by the most explicit mandates of its enactments. Every rational presumption ought to be raised against the existence of any such design in the legislature, and the court should go to the extreme verge of rational, legitimate, interpretation, to rescue the legislature from the imputation of such a design.

Let us see, then, what are the legislative provisions to which this extraordinary operation is sought to be attached. The first is, that in the fifth section of the act of 1805, chap. 110, which provides, "That any property which he, (the insolvent debtor,) shall hereafter acquire by gift, descent, or in his own right, by bequest, devise, or in any course of distribution, shall be liable to the payment of the said debts." Under this act of Assembly it is conceded, as it must be, that no more of such devise or bequest could have been reached or obtained by the creditors of the insolvent, than would have been obtainable by them had no such insolvent discharge intervened. That the devise or bequest vested not in the trustee, but remained in the insolvent debtor, subject to the race of diligence on the part of his creditors. To carry out the design of our insolvent system, which is equality of distribution of the effects of the insolvent amongst all his creditors, the second section of the act of 1834, chap. 293, was passed, which designed to accomplish nothing, but to put an end to this race of diligence amongst creditors, by transferring to the trustee such rights as would otherwise have remained in the insolvent, and thus secure an equal distribution of *his* property, (not the property of other persons,) amongst all his creditors. Sustain the doctrine contended for by the appellants, and although, in the event of a testator's death, a legatee, insolvent in fact, would not be entitled to receive one farthing of the legacy bequeathed to him; yet, if he chance to have been discharged under our insolvent laws,

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his trustee would have a right to compel payment to him of the entire amount of the legacy bequeathed out of the property of the testator, given by his will to his other legatees or distributees. That it was the design of the legislature, in passing the act of 1834, thus to violate the intention of the testator and commit such an outrage upon the rights of others, contrary to every principle of reason, justice and expediency, cannot be imputed to it, if its enactment be susceptible of any other interpretation. That the legislature designed the perpetration of no such enormity, is apparent from its language. It enacts, “that in all cases of application, that shall hereafter be made for the benefit of the insolvent laws, under the act to which this is a supplement, or any of the supplements thereto, or under the act passed at November session of the year 1805, chap. 110, entitled, ‘An act for the relief of sundry insolvent debtors,’ or any of the supplements thereto, all the property within the intent of the fifth section of the said act, passed at November session of the year 1805, chap. 110, that shall be acquired by or accrue to the insolvent debtor, by gift, descent, or in his own right, by bequest, devise, or in any course of distribution, shall be deemed and so distributed, and applied as estate of said insolvent debtor for the benefit of his creditors.” What was acquired by or did accrue to the insolvent by the death of the testatrix, under the fifth section of the act of 1805, chap. 110? The balance, if any, of his legacy remaining due after deducting therefrom the loans made to him by the testatrix. This is the plain and obvious import of the second section of the act of 1834, and that it accords with the design of the legislature in its passage, human ingenuity cannot create a rational doubt. The doctrine, that in chancery equitable set offs will be allowed, where reason and justice require it, although not authorised by any statutory enactment, is so fully established, as to render unnecessary references to adjudications on the subject. But, if they are desired, they may be found in *Lindsay vs. Jackson*, 2 Paige, 581, and 2 Wms. on Ex’ors, 810, 811.

The decree of the orphans court is affirmed with costs, both in this court and in the court below.

Townshend vs. Brooke.—1850.

JEREMIAH TOWNSHEND, ADM'R AD. COL. OF JOHN TOWNSHEND, AND TOBIAS G. TOWNSHEND vs. JOHN B. BROOKE, ONE OF THE EXC'RS NAMED IN THE WILL OF JOHN TOWNSHEND.—June 1850.

The orphans court has no authority to direct a collector *pendente lite*, to pay a sum of money to persons named as executors in a will, to be appropriated as fees to counsel employed to resist a *caveat*, interposed *before the will was admitted to probate*.

The orphans courts are tribunals confessedly special and limited in their jurisdiction, without any constructive or incidental power, and can exercise no authority whatever, not expressly given by law.

Where a *caveat* is filed *after* the will is admitted to probate, and letters testamentary granted to the executors, authority in the orphans court to allow such executors counsel fees to resist the *caveat*, is expressly granted by the act of 1798, ch. 101, sub-ch. 10, sec. 2.

APPEAL from the orphans court of *Prince George's* county.

The appeal in this case was taken from an order of the orphan's court of *Prince George's* county, of the 15th of November, 1849, directing *Jeremiah Townshend*, one of the appellants, as *Administrator ad colligendum* of the estate of *John Townshend*, deceased, to pay to the appellee, one of the executors named in the last will and testament of the deceased, a sum of money for payment of fees to counsel for the trial of certain issues framed in a *caveat*, against the admission of said will to probate. The only question raised by the record, involves the authority of the orphans court to make an allowance to executors for resisting a *caveat* against the probate of the will of their testator, before such will has been admitted to probate. *Jeremiah Townshend* was also one of the executors named in the will, and *Tobias G. Townshend* the other appellant, was one of the heirs at law of *John Townshend*, deceased.

The cause was argued before DORSEY, C. J., MAGRUDER, MARTIN and FRICK, J.

By CAUSIN for the appellants, and

By THOS. S. ALEXANDER, for the appellee.

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MARTIN, J., delivered the opinion of this court.

By the 20th section of the 15th sub-chapter of the testamentary system of 1798, ch. 101, the orphans courts of this State are inhibited from the exercise of any power or jurisdiction, not expressly given by legislative enactment. They are tribunals confessedly special, and limited in their jurisdiction, without any constructive or incidental power, and were so treated and considered by the Court of Appeals in the case of *Scott vs. Burch*, 6 Har. and John., 67, and *Brodless vs. Thompson*, 2 Har. and Gill, 126. In the last case, the court said:

“ The orphans courts derive their powers mostly from statutory provisions, and are tribunals limited in their jurisdiction, unable to exercise any authority whatever, not expressly given by law.”

After a careful examination of the acts of Assembly, bearing upon the powers and jurisdiction of the orphans courts, we can find no clause or provision which can be interpreted as conferring upon those tribunals, authority to direct a collector *pendente lite*, to pay a sum of money to the persons named as executors, in a paper purporting to be a last will and testament, to be appropriated as fees to counsel employed to resist a *caveat* interposed before the paper in controversy was admitted to probate, and consequently before letters testamentary were committed to the persons named therein as executors. It is impossible, therefore, to do otherwise than pronounce the order of the orphans court of *Prince George's* county, of the 15th of November, 1849, to be inoperative and void upon the ground that there was an absolute want of power in that court to pass it. The court being inhibited from the exercise of any incidental or constructive authority, and the power to pass an order like that of the 15th of November, not having been expressly conferred.

This case is clearly distinguishable from that of *Compton vs. Barnes*, 4 Gill, 55. In *Compton and Barnes* the *caveat* was not filed until after the will of *John Barnes* had been admitted to probate, and letters testamentary granted to the executors, in whose favor the order of the orphans court was passed.

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Under such circumstances, it was the plain and imperative duty of the executors to appear to the *caveat*, for the purpose of resisting it, and vindicating the will. And authority in the orphans court to pass the order which was the subject of contestation in that case, was expressly granted by the *second* section of the 10th *sub-chap.* of the act of Assembly 1798, ch. 101.

ORDER REVERSED WITH COSTS.

ISAAC WEBSTER, AND OTHERS, vs. GIST T. COCKEY, AND OTHERS.—*June* 1850.

By the true construction of the act of 1837, ch. 259, sec. 2, provision is made for an appeal from the decisions of the commissioners of Baltimore county, in regard to the opening and shutting up of public roads in said county, to Baltimore county court, but no appeal lies, to this court from the decisions of said county court in such cases.

If no right of appeal were conferred on the county court in such cases, its judgments unwarrantably pronounced on the subject, might by appeal be reviewed and reversed in this court.

From a special limited jurisdiction no appeal will lie, unless specially provided by legislative enactment.

APPEAL from *Baltimore* county court.

Upon the petition of the appellees, the commissioners of Baltimore county, acting under the act of 1825, ch. 219, appointed special commissioners, to adjudge and determine whether a certain road in said county, leading from “*Hunter’s* mill to the *York* turnpike near *Webster’s* mill,” should not be shut, and to report their proceedings. These commissioners thus appointed made return, that in their opinion public convenience required that said road should be shut. The appellants thereupon filed objections which the county commissioners sustained, and rejected the return. The appellees then appealed to Bal-

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timore county court. The appellants then moved said county court to dismiss the appeal, upon the ground that an appeal in such case is unauthorised by law, there being no act of Assembly providing for an appeal in such case, but the court overruled this motion, and ordered a jury to try the questions presented by said appeal. The verdict of the jury was, that the objections to the return of the special commissioners, ought not to be sustained, and that public convenience required said road to be closed. Upon this verdict the court passed judgment reversing the judgment of the county commissioners, and directing the road to be closed. From this judgment the appellants prayed an appeal to this court. Motion to dismiss the appeal.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MAGRUDER, MARTIN and FRICK, J.

By WEBSTER and MAYER, for the appellants, and
By KILBOURN and NELSON, for the appellees.

DORSEY, C. J., delivered the opinion of this court.

The jurisdiction conferred by the General Assembly of Maryland, on the commissioners of Baltimore county, in regard to the opening and shutting up of public roads is a special limited jurisdiction; and from their decisions upon the subject, no appeal will lie to the county court unless provided for by legislative enactment. If such right of appeal from the proceedings of the commissioners be given by the legislature to the county court, its judgments thereon cannot be reviewed on appeal to this court, unless the latter right of appeal be in like manner given. But if no such right of appeal be conferred on the county court, then its judgments unwarrantably pronounced on the subject, may by appeal be reviewed and reversed in this court. In deciding therefore on the motion to dismiss the appeal before us, our inquiries are confined to two facts; to wit: has the legislature vested in the county court an appellate power over the proceedings of the commissioners, in opening and shutting up public roads in Baltimore county, and from the exercise of such appellate powers given to the county court, has the legislature given a right of appeal to this tribunal? For

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the transfer of the latter power, or right of appeal no legislative sanction has been found. Our labors are then narrowed down to the simple question, has the county court been clothed with the above mentioned appellate authority? For such an appeal the 2nd section of the act of 1837, ch. 259, according to its true construction, we think, has made provision. The act of 1825, ch. 219, confers on the levy court of Baltimore county, (whose powers by the act of 1826, ch. 217, are transferred to the commissioners of Baltimore county,) the authority of opening, straightening, widening, altering, amending or shutting up, public roads in that county. The first section of the act of 1837, ch. 259, enacts, that in all cases of dispute between contending parties in regard to the opening of roads, "the commissioners are authorised to issue subpoenas for witnesses, &c., and the second section enacts, "that in all cases, as before mentioned, each party shall have the right of appeal to Baltimore county court." On the part of the appellants it is insisted, that the power of summoning witnesses, &c., is to be construed strictly, and is confined to "contending parties," as to "opening roads," and does not embrace contending parties as to shutting up roads. Such a restricted interpretation of the act of 1837, renders it no adequate remedy for the grievance which induced its passage, and is not in accordance with the legislative intent. The design of the enactment was to confer the powers given to every case of "contending parties," in relation to every species of authority over public roads, the exercise of which was warranted by the act of 1825. With almost as much propriety might it be insisted, that the act of 1837, did not embrace cases of contests about straightening or widening, or altering or amending public roads, or the damages awarded in relation thereto.

Assuming the existence of the appellate power exerted by the county court in this case, for the correction of any errors or irregularities in its proceedings under the same, no appeal lies to this court. See the cases of the *Wilmington and Susquehanna Rail Road Company vs. Joseph Condon*, 8 *Gill and Johns*. 443. *The Savage Manufacturing Company vs.*

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Henry H. Owings, 3 Gill, 497; and *Amos A. Williams vs. George H. Williams, Trustee, &c.*, 5 Gill, 84.

The appeal in this case, to this court, is dismissed.

APPEAL DISMISSED.

FRANCIS J. BRUMMETT, USE OF ROBERT S. REEDER, TRUSTEE OF FRANCIS J. BRUMMETT, vs. CATHARINE GOLDEN AND GEORGE BRENT, ADMR'S OF WM. B. GOLDEN.—June 1850.

The acts of Assembly of this state authorise the maintenance of an action of *trover* against administrators for an alleged conversion by their intestate.

APPEAL from *Charles* county court.

This was an action of *trover*, instituted by *Francis J. Brummett*, the appellant, against the appellees, as admr's of *William P. Golden*, deceased, to recover the value of two bonds, the property of the plaintiff, which the declaration alleged had been converted by the intestate in his lifetime. The defendants, the administrators, filed a general demurrer, which the county court sustained, and the plaintiff appealed.

The cause was argued before DORSEY, C. J., SPENCE, MAGRUDER, MARTIN and FRICK, J.

REEDER, for the appellant, contended that the action could be maintained:

1st. That it can be maintained for the value of a bond. See *Kent vs. Somervell*, 7 G. & J., 265. See, also, *Smith vs. Robertson's Executors*, 4 H. & J., 30.

2nd. That an action of *trover* can be maintained against

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the administrators or an intestate, for a finding and conversion by an intestate in his lifetime. See section the 5th of the act of 1798, ch. 101, sub-ch. 8, where they are liable to be sued, and have power to sue in *all* cases, except slander and torts to the person. It lies against executors. See *Decrow vs. Moore*, 1 *Hayw.*, 21. See also, *Clarke vs. Kenon*, 1 *Hayw.*, 308. *Avery vs. Moore*, same vol. 362. These references may be found in *Metcalf and Perkins' Digest*, 583.

3rd. It is needless to refer to authority to show that there can be an amendment from *trover* to *assumpsit*, and a procedendo would enable the plaintiff so to amend, if the present action could not be maintained.

GEO. BRENT for the appellees.

The point presented upon demurrer in this case, is whether or not *trover* can be maintained against the defendants for an alleged conversion by their intestate.

That it cannot at common law, I think is clear. Where the declaration imputes a tort done to the person or property of another, and the plea must be "not guilty,"—the rule is "*actio moritur cum persona*." 2 *Sanders' Plead. & Ev.*, 886. *Carter vs. Fosset*, *Cro. Car.*, 540. *Perkinson vs. Gilford*, 1 *Ld. Raym.*, 433. *Wheatley vs. Lane*, 1 *Saund. Rep.*, 216, and note (1) in the 5th Amer. Edition.

Is this rule changed by the 5th sec. of 1798, ch. 101, sub-ch. 8.

I have been unable to find any decision in Maryland upon the point, or any case in which an action of *trover* has been brought against an administrator for a conversion by his intestate—and I believe there is none.

It is now for this court to give a construction of this part of the act. It does not seem to me to authorise this form of action in this case.

I submit the case to their construction, and deem it needless to trouble them with my particular views.

MAGRUDER, J., delivered the opinion of this court.

Before the act of 1798, ch. 101, an effort had been made

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to prevent any action from abating by the death of either party. The act of 1785, ch. 80, says expressly that no action shall abate by the death of either party, and attempted to provide for the continuance of such suits by prescribing the process, which is to be issued, in order to make proper parties to the suit. The act of 1798, ch. 101, sub-ch. 8, sec. 5, gives to executors and administrators full power to commence any personal action whatever at law or in equity, which the testator or intestate might have commenced, except actions of slander or injuries, or torts done to the person, and makes them liable to be sued in any court of law or equity, in any action except as aforesaid, which might have been maintained against the deceased. The act of 1801, ch. 74, sec. 38, forbids the abatement of several actions pending at the time of the death of either of the parties, and among the rest, actions of trover.

These several acts of Assembly certainly authorise the institution of this action of trover against the defendants, as administrators, for the alleged conversion by their intestate, of the instrument of writing set forth in the declaration.

Although some alterations might be made with advantage in the declaration, and in some places unnecessary words are to be found, yet we do not think that a general demurrer can be sustained.

JUDGMENT REVERSED, AND
PROCEDENDO AWARDED.

STATE OF MARYLAND vs. ALEXANDER MILBURN AND OTHERS.
June 1850.

To an action on a collector's bond, the defendants pleaded in bar, four pleas, upon three of which, the plaintiff joined issue, but demurred to the *second*.

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This demurrer the court sustained. The cause was then tried on the issues joined on the other pleas, and the verdict and judgment were for defendants, and the plaintiff appealed. No appeal was taken by defendants from the judgment of the court sustaining the plaintiff's demurrer to the plea. HELD: that the correctness of the opinion of the court as to the validity of the second plea, is not open for examination on this appeal by the plaintiff.

A prayer, that if the jury find certain enumerated facts, "then the plaintiff is not entitled to recover," is based, not on the pleadings, but on the proof, and in granting the instruction, the court are to be considered as placing their opinion, not on the structure of the pleadings, but on the broad ground that if the jury find the facts as stated, the plaintiff cannot maintain his action.

The 52nd sec. of the act of 1841, ch. 23, does not prohibit the levying of the State tax at any other period than that at which the county tax was imposed. This section is imperative only so far as to prohibit the levy of the county tax, unless the State assessment be first provided for, and this may be done either before or at the time of the levy of the county tax, The 15th section of the act of 1843, ch. 208, is applicable only to the mode in which the State and county taxes are to be collected, and in this respect alone, repeals the 52nd section of the act of 1841, ch. 23.

Under the act of 1841, ch. 23, as it now stands, an assessment by the local tribunals for county or city purposes, is unauthorised and void, unless before or at the time of levying the county tax, a tax for the State be laid, as required by the acts of Assembly, applicable to the subject.

APPEAL from *Saint Mary's* county court.

This was an action of *debt*, instituted by the State upon the bond of *Alexander Milburn*, with the other appellees as his sureties, as the collector of the State tax in *Saint Mary's* county, for the year 1845. The bond is dated 26th of April, 1845. At the trial, but one exception was taken, which, with the pleadings in the case, is set out in full in the opinion of this court. Judgment was rendered for the defendants, and the plaintiff appealed.

The cause was argued before DORSEY, C. J., MAGRUDER, MARTIN and FRICK, J.

RICHARDSON, Attorney General, and HILLOWAY for the State, contended:

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First. That the commissioners of *St. Mary's* county had the legal power and authority on the 6th of May, 1845, to appoint a collector of State tax for said year; that the act of 1841, ch. 23, and its supplements, so far as they relate to the appointment of collectors, delegated a *general power* to said commissioners; and that said acts, so far as they relate to the *time* of the appointment of collectors, are directory, not imperative.

Second. That said commissioners were not *required* by law, at the time they met for the purpose of imposing a tax for the use of said county—to impose an assessment or tax for the use of the State;—because there was no time fixed by law, at which said county tax was to be levied. And further, because the intention of the legislature, as expressed in the 52nd sec. of the act of 1841, ch. 23, in directing that the State and county tax should be imposed at the same time, was, as directed by said section, that the said State and county tax should be collected at the same time, and by the collector appointed to collect the county tax; and under the same bond; that the collection of said State and county tax being afterwards severed by the 15th sec. of the act of 1845, ch. 208, the levying of the State tax any time by said commissioners, was legal. That the said act of 1841, ch. 23, and its supplements, so far as they relate to the duty of said commissioners to impose a tax for the use of the State, are imperative; but so far as said acts relate to the time they are to be imposed, they are *directory*.

Third. That therefore, the third and additional pleas of the appellees, by them pleaded, are bad in substance;—and therefore no defence to this action, and that the issues in fact joined thereon, are wholly *immaterial* issues, and that the court in instructing the jury that the facts offered in evidence, if they believe them, were a defence to the action, erred in point of law.

Fourth. That the appellant is entitled in this action to a judgment *non obstante veredicto*.

MEREDITH and CAUSIN, for the appellees, insisted that there was no error in the instructions of the court excepted to.

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1st. Because the evidence contained therein was admitted without objection on the part of the State, and was pertinent to the issue joined on the 4th plea.

2nd. Because the State having elected to take issue, and not to demur to the said plea, admitted thereby, that the matter of said plea, was matter in bar of the action, if true, and the instruction, leaving it to the jury to find the facts, conformed to the rights of the jury and the duty of the court; and that since the act of 1825, ch. 117, the Court of Appeals is confined to the very point presented to the court below under the pleadings and evidence, which in this case, as the appellees conceive, was the legal sufficiency of the evidence to sustain the issues joined on the 4th plea.

3rd. Because the facts being admitted on the exception, the commissioners of *St. Mary's* county made no legal levy of State tax for the year 1845, under the act of 1841, ch. 23, sec. 52, inasmuch as the levy pretended to be made, was not made, at the time of meeting to levy the county tax, as required by the said act.

4th. That if judgment should be reversed, no *procedendo* should issue, because the matters stated on the 2nd plea furnish a complete bar to the action on the bond.

MARTIN J., delivered the opinion of this court.

In this case an action was instituted in *Saint Mary's* county court, upon the bond of *Alexander Milburn*, given by him and his sureties, for the faithful performance of his duty as the collector of the State tax in that county, for the year 1845. To this bond the defendants pleaded, in bar of the plaintiff's right to recover, four pleas.

1st. Performance by *Alexander Milburn* of the conditions of the bond.

2nd. That the said *Alexander Milburn* was appointed collector for the State tax, by the commissioners of *Saint Mary's* county, on the 6th of May 1845; and that, on the same day, the said commissioners received and approved of the said bond, and not before; and that on the 6th of May 1845, the said com-

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missioners had no legal power or authority to appoint the said collector.

3rd. That the said commissioners failed and omitted to make a legal levy of the State tax, for the year 1845.

4th. That the said commissioners did not, at the time of meeting for the purpose of levying taxes for the use of the said county, for the year 1845, impose an assessment or tax for the use of the State, as by law they were required to do.

To the *first third* and *fourth* pleas, the plaintiff replied, by way of traverse, and entered a general demurrer to the *second plea*, in which the defendants joined. Upon this demurrer judgment was rendered by the court in favor of the plaintiff. No appeal was taken by the defendants from this judgment of the court, and the correctness of the opinion of the court, with respect to the validity of the *second plea*, is therefore not open for examination on this appeal. The case was tried before the jury upon the issues joined, upon the first, third and fourth pleas. We find in the bill of exception the following statement. "The plaintiff to support the issues upon her part joined, read to the jury, for the purpose of proving the time of levy of the State tax for 1845, the minutes of proceedings of the commissioners of *Saint Mary's* county, of May 6th 1845, the witness, *George Spalding*, having proved that he made the said minutes as clerk of the commissioners, and regarded them as the proceedings of the court. The defendants then, to support the issues upon their part joined, proved by the witness, *Spalding*, that the said commissioners met for the purpose of levying the State tax for *Saint Mary's* county, on the 5th of May 1845, and for no other purpose; and by the said witness, and by the minutes before mentioned, that they did on the 6th of May 1845, levy the tax for the use of the State, for the year 1845; and did order the tax list to be delivered to *Alexander Milburn*, a collector, which was done; they further proved by the said *George J. Spalding*, that the said commissioners did not assemble or meet for the purpose of levying the taxes for the use of *Saint Mary's* county, for the year 1845, until the fourth of August 1845, as had been the constant prac-

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tice, when they met at *Leonardtown*, for the first time, for that purpose, and on that day completed and made the levy of tax for county purposes, upon the assessment of taxable property in the said county, corrected up to that day; they further proved by the tax books, and by the said *Spalding*, that the basis of State taxation and county taxation was different for that year, in consequence of changes of property between the said 6th of May and the said 4th of August 1845.”

It appears from the record, that at this stage of the cause, and in this condition of the evidence, the defendants prayed the court to instruct the jury, that if they found these facts as stated, then the plaintiff was not entitled to recover. This prayer was granted, and the plaintiff excepted. The prayer and the instruction are of the most general character; based, not on the pleadings, but upon the proof; and in granting the instruction, the court are to be considered as placing their opinion, not upon the structure of the pleadings, but on the broad ground, that if the jury found the facts as stated in the testimony, that the levy of the State and county tax was made at different periods, that the tax in question was illegally imposed, and that consequently there had been no such violation of the collector's bond as would authorise this action. The cases of *Leopard vs. The Chesapeake and Ohio Canal Company*, 1st Gill, 222; and *Stockton vs. Frey*, 4 Gill, 406; are conclusive upon this point of practice. And the single question presented by the record, for the revision of this court, is that which relates to the ruling of the court below, with reference to the legality of this assessment, an exceedingly narrow and limited question, depending entirely upon the true construction of the 52nd section of the act of Assembly, 1841, ch. 23.

The 52nd section of the act of 1841, ch. 23, declares: “That it shall be the duty of the levy courts or commissioners of the several counties, and of *Howard* district, and of the mayor and city council of *Baltimore*, at the time of meeting for the purpose of laying taxes for the use of their respective counties, district, or city, in the year eighteen hundred and forty-two, and annually thereafter, to impose an assessment or

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tax for the use of the State, of twenty cents, or one-fifth of one *per centum* on every dollar's worth of assessable property within their respective jurisdictions, according to the corrected value thereof, with a commission thereon, at the rates hereinbefore provided, for the use of the collector or collectors; which said assessment shall be collected by the collector or collectors, appointed for the collection of the taxes imposed for the use of the said counties, district and city, respectively, and at the same time and in the same manner." And the counsel for the appellees have contended, that this section of the act of 1841, is to be considered as imperative in its character, and prohibited the commissioners from levying the State tax, at any other period than at the meeting at which the tax was imposed for the purposes of the county. This construction of the act of Assembly, we think, cannot be maintained. The act was passed to provide a tax to pay the debts of the State. The levy courts or county commissioners were selected by the State as her agents to impose this tax, although the State had certainly no immediate or direct interest in the imposition of the local assessments. The object to be accomplished was the execution of this revenue law, upon the successful operation of which depended the ability of the State to pay her debts, to comply with her engagements, and to preserve, unimpaired and unsullied, the public faith and credit. And it is very apparent, we think, from the various clauses in this act, as well as the acts of 1842, ch. 269, and 1843, ch. 208, referred to by the counsel for the appellant, as illustrative of the intention of the legislature, from the peculiar circumstances, under the influence of which this revenue statute was produced, and from the history of the times in which it was passed, that the particular provision under consideration, was introduced as a means of securing the *certain* imposition of the State assessment, by making the county assessment dependent upon it, and by prohibiting the local authorities from laying a tax for county purposes, except upon the condition that they performed their duty to the State, by imposing the State tax as required by the act of 1841. In this sense, and to this extent, the provision in question is to

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be treated as imperative. But the object to be attained was the levy of the State assessment. If this was done, either before or at the time of meeting for the imposition of the local tax, the purpose of the Legislature was accomplished; and with the condition that the county tax was not to be imposed, unless the State assessment was provided for, the time at which the State assessment might be laid, was committed to the discretion of the levy courts, or the commissioners designated as the agents by whom the tax was to be levied. It is also proper to announce, that we consider the 15th section of the act of 1843, ch. 208, as applicable only to the mode in which the State and county taxes are to be collected; and that in this respect alone is the 52nd section of the act of 1841, ch. 23, repealed by the 15th section of the act of 1843. And that as the law stood under the act of 1841, ch. 23, and as it now stands, an assessment by the local tribunals for the county or city purposes, would be treated as unauthorised and void, unless before, or at the time of levying the county tax, a tax for the State was laid, as required by the acts of Assembly applicable to this subject.

It follows from the views we have thus expressed, that there was error in the ruling of the court below, and that the judgment must be reversed. The construction we have placed upon the 52nd section of the act of 1841, has rendered it unnecessary to examine many of the points raised by the counsel in the argument of this cause, and discussed by them with great ability.

JUDGMENT REVERSED AND PROCEDENDO.

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STATE OF MARYLAND vs. ALEXANDER MILBURN AND OTHERS.
June 1850.

It is a general rule in the interpretation of legislative acts, not to construe them to embrace the sovereign power of government, unless expressly named or included by necessary implication.

The general words of a statute ought not to include the government, or affect its rights, unless the construction be clear and indisputable upon the text of the act.

In construing statutes, the real intent, when ascertained, will always prevail over the literal sense of the terms. If the words do not exclude doubt, the intention is to be collected from the occasion and necessity of the law.

It was not the intent of the legislature, by the act of 1845, ch. 193, to avoid bonds, given directly to the State, unless they were stamped, and the State may maintain an action on such a bond, although it be not on stamped paper.

APPEAL from *St. Mary's* county court.

In this case an action of debt was instituted by the State upon the bond of *Alexander Milburn*, (given by him and his sureties, the other appellees,) as collector of the State tax in *St. Mary's* county for the year 1846. The bond is dated the 29th of April, 1846, and recites, that said *Milburn* had been appointed collector of the State tax in said county for the year 1846, by the commissioners of said county, and is conditioned for the faithful performance of his duties as such collector. Upon this bond was the following endorsement:

“May 4th, 1845. The commissioners of *St. Mary's* county approve of the within bond and securities, and order the same to be recorded. *Geo. J. Spalding*, cl’k.” Also the endorsement of the recording on the 5th of May, 1846.

The defendants craved oyer and pleaded:

1st. Performance, by the said *Alexander Milburn*, of the conditions in said bond.

2nd. That said bond was not signed, sealed, delivered and approved, until the 4th of May, 1846, and that the paper on which said bond was written, was not at the time of its said execution, delivery and approval, nor has been since that time, duly stamped, as required by law.

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3rd. That at the time the said *Alexander Milburn* was appointed, by the commissioners of *St. Mary's* county, the collector of the State tax for the year 1846, to wit, on the 4th of May, 1846, the said commissioners had no legal power or authority to make said appointment.

4th. That said commissioners failed and omitted to make a legal levy of the State tax for the year 1846 in said county.

5th. That at the time said obligors respectively signed their names to said bond, said bond was in blank as to date, and was signed in blank by the said obligors, at different times and places, and that the date in said bond was subsequently written there by a third party, without their knowledge and consent.

6th. That until the said 4th of May 1846, the said bond was never delivered, but until that period was an *escrow*; and that on the said day of its delivery, the said commissioners had no legal power to approve the same.

7th. That the said commissioners did not, at the time they met, for the purpose of levying taxes for the use of said county for the year 1846, impose an assessment or tax for the use of the State.

The State replied by way of traverse to the 1st, 4th and 7th pleas, and on these pleas issues were joined. To the 2nd, 3rd, 5th and 6th pleas, the State entered a general demurrer, to which there was a joinder by the defendants.

The court sustained the demurrer to the 3rd, 5th and 6th pleas, but overruled the demurrer to the 2nd plea, and gave judgment for the defendants, from which the State appealed.

The cause was argued before DORSEY, C. J., SPENCE, MAGRUDER, MARTIN and FRICK, J.

RICHARDSON, attorney general, and HILLOWAY for the State, contended :

That bonds executed to the State by the collectors of the State tax, are not required to be stamped under the act of 1845, chap. 193; that it was not the *intention* of the legislature, in passing said act, to require a stamp on bonds executed *directly*

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to the State, and which were to enure to the benefit of the State. That said act being in general terms, no rights of the State can be affected by it; that the State cannot be divested of any right which is an incident to her sovereignty, unless it is specially divested by the express and positive terms of a statute.

MEREDITH and CAUSIN, for the appellees, insisted :

1st. That the act of 1845, chap. 193, requiring bonds with collateral condition to be stamped, makes no exception of bonds given to the State, and in its terms embraces any bond, no matter to whom given, and thus includes collectors' bonds, as well as those of trustees, sheriffs or executors.

2nd. That the well established rule for the construction of statutes is, that the intention of the legislature, gathered from the statute, is to govern and determine its meaning, and the object of the law may be resorted to for elucidation of doubt; that applying this rule, the court can find no warrant, either in the object of the law, (to relieve the pressure of direct taxation on property, by indirect aid,) or the design of the legislature, (to realise as large a sum as practicable from this source;) for excluding from the operation of the stamp tax law, the very persons, who alone derive a direct benefit from its imposition, to wit, the collectors of the tax themselves.

FRICK, J., dissented, and delivered the following opinion, in which DORSEY, C. J., concurred.

This action is instituted upon a bond given to the State of *Maryland*, by a collector of the State taxes and his sureties, the present appellees.

Several pleas were filed to the action below, to some of them an issue was tendered by the plaintiff, to others the State, by its attorney, demurred. The principal and the only important question, however, for the decision of this court, arises upon the second plea, which asserts, that the plaintiff ought not to maintain this action; "because the said writing obligatory was not signed, sealed and delivered, and approved until the 4th of May, 1846, and that the paper upon which the said writing

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obligatory is written, was not at the time of said execution, delivery and approval, nor has it since, *been duly stamped*, as required by law.”

The demurrer of the plaintiff to this plea was by the court below overruled, and is now before this court upon the appeal. In support of the appeal the appellant contends, that bonds executed to the State by the collectors of the State tax, are not required to be stamped under the act of 1845, ch. 193; that it was not the intention of the legislature in passing that act, to require a stamp on bonds directly to the State, and which were to enure to the benefit of the State; that the act being in general terms, no rights of the State can be affected by it; that of any such right, which is incident to her sovereignty, the State cannot be divested, unless by the express and positive terms of the statute.

This presents a question of delicacy and importance, both in its operation upon the revenue system of the State, and upon her immunities and privileges as a sovereign power in the exercise of her sovereignty. It will not be denied nor can it be questioned, that the State has such privilege and preeminence over the citizen as is here asserted. Under the doctrine of prerogative, “*semper præsumitur pro rege*,” this preference or exemption in favor of the sovereign power in the State, wherever it may be found to reside, and in whatever form, is conceded, and is in no sense obnoxious to the principles and spirit of our institutions. It is, on the contrary, a necessary incident to sovereignty in every government, based upon sound policy, and creates the exception in favor of the State to those general rules that are established for the rest of the community. It constitutes a branch of the common law, which, by the third article of the bill of rights, is adopted, “so far as it is not inconsistent with the principles of that instrument and the nature of our institutions.” 5 H. & J., 317, 358, 392, 401. Under these general terms, used in the declaration of rights, it has been uniformly recognised as the law of our courts. It has always been asserted as a right of preference in the State in the distribution of the property of a debtor, in the settlement of

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the estates of deceased persons, and in various instances where the State is a creditor, or a party, and is entirely consistent with the spirit and principles of our political institutions, as a necessary attribute of the authority in which the rights of sovereignty, the *jura summa imperii*, reside. Conforming to this sovereign prerogative, the State is not to be restrained of any right she had before, by the general words of a statute, but must be distinctly designated as within the intent and provisions of such statute. Not that it is imperative that the State should be named, but it should plainly appear from the language used, that the State itself was in contemplation of the legislature, in passing the statute. See *United States vs. Hoar*, 2 Mason, 314. Without being specially named, the State may, by necessary implication, be included in a law general in its character and enactments. In the case of the *United States vs. Knight*, 14 Peters, 315, the general rule is stated, that where any prerogative right or interest is divested or taken from the king, he is not bound, unless he be expressly named, “or what would be equivalent, unless the language is such as to show clearly that such was the intent of the act.” And the principle is stated as one decided in *New York*, *Massachusetts*, *Pennsylvania*, and no doubt in other States, not upon the notion of prerogative alone; for although so designated, yet the immunity is placed more properly upon the great principles of public good and public policy, alike applicable to all governments, and alike indispensable to their efficient operation. “It is a general rule,” says *Judge Story*, in 4 Mason, 431, “in the interpretation of legislative acts, not to construe them to embrace the sovereign power of government, unless expressly named or included by necessary implication.”

The question is therefore one of intention; and resolves itself into the inquiry, whether the legislature whose will indicated by its laws, directs the policy of the State, designed to include her within the provisions of this law? and whether such intention may be clearly deduced from language expressly used, or inferred, by necessary implication, from the whole tenor and character of the law?

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It is important to bear in mind that this is a revenue measure; one of those that constitute a part of the whole system, devised by the legislature to relieve the burden of debt weighing upon the energies of the State; and imports on its face to be "An act to aid in paying the debts of the State."

From the tenor of the original act of 1844, sec. 1, as well as from the character of the bonds and obligations embraced by it, it would seem that the legislature regarded the tax imposed by it, as one to be paid by the obligor, or necessarily falling on him, by the express exemption of bonds *given by* the State, from its operation; that "nothing in the act contained shall be construed to charge a duty, or to require to be stamped, any bond of this State or certificate of debt issued by this State," &c. Here then, in the original act of the legislature, the State is expressly named in the exemption from a duty or charge imposed upon all of her citizens not otherwise excepted. And but for this exception, it is plain the legislature considered the State bound and included by necessary implication within the general terms of the act. By the decision of this court in *Burton et al., vs. The State*, 3 Gill, p. 1, it was determined, however, that the words "bonds and obligations," in this act of 1844, were to be restricted to such as are given for the payment of money; and that bonds of trustees, executors and others, conditioned for the faithful performance of their *official* duties, in other words, bonds with collateral condition, were not required to be stamped. Hereupon, and to supply the defect, follows the act of 1845, ch. 193, a supplement to 1844, and intended to embrace that extensive class of bonds, official bonds and all bonds with collateral conditions, which had been excluded from stamp by this judicial interpretation of the act of 1844, and after affixing the rate of tax, proportioned to the penalties of these bonds, incorporates with the act the fifth, sixth, seventh, and eighth sections of the act of 1844, as parts of the act of 1845. In this act no reason existed for an express exemption in favor of the State, when it was not in contemplation, *that the act should impose any tax or charge upon the State*. The bonds here contemplated were to be given *to* the State, not *by*

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the State, as under the act of 1844. Within *this* act the State is the creditor, the obligee exacting the bond. The charge of the tax was necessarily, and from all the known relations and analogies between debtor and creditor, upon the debtor or obligor. The act, as a revenue measure, was in favor of the State, and passed “to aid in paying the debts of the State.” All that the act requires of the State is, that as a condition to the validity of bonds taken in her name, and in which as obligee she has a direct interest, her official agents before the bond is accepted and approved, should know that the tax levied by the act has gone into the treasury, and this is to be ascertained by the naked inspection of the bond. Having exempted the State as an obligor under the original act, she might well be required in aid of her own revenue, and with only ordinary vigilance, to see that the obligees with whom she treated, had complied with the law. If she neglect this primary duty, through the culpable laches of her agents, she is as much involved in the consequences as any of her own citizens. Under the legitimate construction of this act of 1845, she is, by necessary implication, as much included within the act, as if she had been specially named and designated; and much more clearly so when both acts, considered as one statute *in pari materia*, are taken together, and construed together, for the purpose of discovering the legislative mind. In the original act we have seen that the State is specially named and specially excluded from its operation. Without this exemption, as a revenue measure, when the State was passing thousands of her bonds to creditors at home and abroad, she might, by necessary implication, have been deemed within the provisions of the act of 1844. But the legislature relieved all doubt or question, by conceding her prerogative in words to that effect, so as to repel any implication arising from the terms and the character of the law. When we afterwards turn to the act of 1845, the supplement inseparable from the original, with their several sections and provisions referring to and interwoven with each other, and without which the act of 1845, has no sanctions or penalties, shall it be said, the State is not bound by it, because she is not especially

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named in the supplement, when by every intendment and implication of law, she must have been, from the character of the law, distinctly in view of the legislature in passing it? They have said in effect, by fair construction of these two acts of Assembly, we exempt the State from stamps upon her own debts, and her obligations to others, but it is the only exception we make in her favor; since with regard to other contracts where the State is the party obligee, it is her interest and her duty to the revenue, to secure the payment of the stamp by the obligor. Such seems to be the express design upon the face of the two acts, and any other construction would violate the manifest intent of the legislature, and destroy an important feature of State policy, adopted and designed to increase her resources by every sound and practicable revenue measure. Both acts taken together, constitute the so called stamp laws of the State, and "all acts *in pari materia*, are to be taken together as if they were one law, because they are considered as framed upon one system and having one object in view." *Dwarris*, 699.

"The rule for the construction of statutes," says this author on the same page, "is that not only one part of a statute may be properly called in to help the construction of another part, but that it will be inferred or presumed that a number of statutes relating to the same subject, were intended to be governed by one spirit and policy, to be consistent in their several parts and provisions."

It has been objected, that to bring the State within the provisions of this act, would be to place her in a worse position than her citizens, in relation to its provisions. The 8th section of the act of 1844, (incorporated with 1845, as part of the act,) provides in effect that if any of the instruments of writing mentioned shall not be stamped according to the act, or stamped for a lower duty than is chargeable upon it, it shall not be valid or available for any purpose; but that the person or persons *holding* such instrument, upon making oath or affirmation that they were ignorant of the requisitions of the act, or that the instrument was received by them through inadvertance or forget-

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fulness, by paying the sum of ten dollars, together with the duty chargeable, may restore the validity of such instrument to all intents and purposes, as if the same had been originally stamped according to the act.

Thus the State in her sovereignty being, as is contended, in no sense the *holder* of the instrument, or a person competent to make the oath, is excluded from the *locus penitentiae* of the act, and can in no way restore the vitality of an unstamped bond, in which she is the obligee and the party in interest.

But the force of this argument is not felt, in view of the fact that some person must necessarily be the custodiary or holder of all such bonds; that some person or persons are designated in every case, whose duty it is to see to its legal execution and approval, in all which a compliance with this act and the requisite of a stamp is included. It is an overstrained construction, to say that such a person for all the purposes of this healing provision of the act is not the holder, as the agent and representative of the State; and if he has committed the laches, is he not competent to repair it by making the affidavit required? Fraud or design to evade the law can in no possible case be imputed to him as the agent of the State. There is no possible motive to invite to it; every thing, on the contrary, to forbid it. As an official of the State, he can have no supposable interest in rendering her securities void or vicious. His duty is one of mere inspection, for the obligor is expected to procure the stamp and to tender the bond in proper form. Any default of the agent of the State, the person for the time being the holder of the bond, must result from ignorance and inadvertence and from no desire to evade the law. What difficulty ought there to be then in conforming to the law, looking to the party who represents the State, in accepting the bond as entirely within the equitable construction of the proviso?

In the present case the bond before the court bears the following endorsement. "May 4th 1845. The commissioners of *Saint Mary's* county, approve of the within bond and securities, and order the same to be recorded. *Geo. J. Spaulding* clerk." What difficulty or objection can there be in procuring

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from this clerk or either of the commissioners, the required affidavit that the stamp is here omitted inadvertently and with no design to evade the law? There ought to be none; there can be none. And when done, the bond is healed and may be given in evidence; while the officers themselves are relieved from any sinister imputation, that might rest on the good faith and fidelity which is always supposed to attach to the discharge of every public duty.

Otherwise if this objection can be of serious weight it cuts too deep. For in the same category with this bond must be included all bonds, to levy courts, county commissioners, all the bonds of county clerks, registers of wills and others, in which the State has a direct interest and from which she derives a large revenue. All the parties accepting and approving these bonds, must be equally disqualified and excluded from giving vitality to an unstamped bond, and by the same reasoning on the strength of this argument, such bonds (the State having a direct interest in all of them,) must be excluded from the operation of the law.

The whole design of the law must be thus substantially defeated and becomes a nullity; and the legislature in healing the defect of the original law, have passed a supplement absurdly leaving the case, for all practical purposes of revenue, and danger and hazard in the collection of it, worse than it was before. It is not to be reconciled with any just interpretation of this statute, that all bonds to corporations, commissioners and bodies politic of every description, (whether the State is or is not a party in interest,) should not be within the equitable construction of this proviso, and that such obligees are not competent, through the agents who represent them, in accepting such bonds, to heal any defect occasioned by inadvertence or ignorance on the part of such agents, and yet within the strict phraseology of the law, such agent or official may not be properly the holder of the bond. It is entirely consistent with the whole theory of these two acts, that the official bonds to the State should be included within their requisitions. Prior to the present tax system, the State had but little if any

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direct interest in collections made through the instrumentality of such bonds. Although the State was in all instances the obligee, and the nominal party, she was to derive no benefit or revenue from them. Under the system as it now exists, she is to some extent directly and beneficially interested in the bonds of clerks, registers, sheriffs, administrators, executors, and in all bonds of a similar character. Each and all the subjects to which these bonds respectively relate, are now matters of revenue to the State, directly or indirectly, and contemplate moneys to be paid into the treasury by the obligors. Exclude these, and the proportion of bonds with collateral conditions, upon which the law could operate would be but small. All other bonds for the payment of money contributed before, under the act of 1844. It is difficult therefore to imagine that the State was not directly and prominently in view of the legislature, and it is hazarding little to say that the whole design of the law of 1845, was to invoke into contribution as a fair and profitable source of revenue this large class of bonds, to which the State was a party in interest.

It is notorious that the charge of executing and tendering such bonds, is uniformly upon the obligors and that they are to be approved by some authority acting for and under the State. Is it asking too much of the State, to require that through these her official agents, she should secure the stamp as essential to its validity, before it is approved and accepted? These same agents of the State would before have rejected, and would now reject the bond, if deficient in *the seal*. How much additional labour is it to inspect the stamp, when looking for the seal, and the other essentials to a good and valid bond? Certainly not enough to cause her representatives to flinch from the duty, when the revenue is to find its way to the State coffers.

This interpretation of these acts, is deemed not only reasonable and consistent with the whole theory of legislation on the subject of stamps, but it would seem to be written upon the face of the acts. In the original act the State is expressly named as a party, and independent of the connection of the supplement by which they are constituted one act, she is a party

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from the necessary implication, that if excluded, the *whole design of exacting revenue from bonds with collateral conditions, is materially impaired and the vitality of the act destroyed.*

The result of my examination of these acts of the legislature, and my conclusion drawn from them is, that the demurrer of the plaintiff to the defendant's plea was properly overruled by the court below.

MAGRUDER, J., delivered the opinion of this court.

Milburn, one of the appellants, was appointed the collector of the State tax in *Saint Mary's* county, for the year 1846, and he, with the other appellees, (his securities,) executed the bond on which this suit is brought, for the faithful performance of his duties.

One of the pleas filed in the case, is, that the said writing obligatory, was not signed, sealed, delivered and approved until the 4th of May, 1846, and that the paper upon which said writing obligatory is written, was not at the time of said execution, delivery and approval, nor has it since been, duly stamped as required by law.

To this plea, there was a demurrer by the State, and the same was overruled by the court below, and from that decision, the appeal is taken by the State. Other demurrers filed by the State, were ruled good, and of course from them there is no appeal.

The question really is, whether for the want of a stamp, this action could not be maintained? In reversing the decision of the court below, we do not mean to deny that it is the duty of the proper officers, to take care that bonds of this description, before they are approved, have the requisite stamp. But is the State to be without remedy because of this neglect of duty by the public agents?

The instrument of writing, it is admitted, was signed and sealed, and delivered and approved, but because the paper on which it was written had not the stamp, no action, it is contended, can be sustained upon it.

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The act of Assembly 1844, ch. 280, sec. 8, says, that “no instrument of writing whatsoever, charged by this act with the payment of a duty as aforesaid, shall be pleaded or given in evidence in any court of this State, or admitted in any such to be available in law or in equity;” and if this bond had been given to a private individual, no doubt, until it was stamped, a recovery could not be had upon it in any of our courts. But this bond was given to and for the use of the State, and the question is, whether this clause is applicable to such a bond?

If such a question was to arise in any of the courts of England, upon a bond like this given to the king, it can scarcely be doubted that the action could be sustained. “The king may avail himself of the provisions of an act of parliament, but is not bound by such as do not particularly and expressly mention him.” To this, it is true, there are exceptions, but none of them will embrace such a case as the one before us. So too in the same author, (*Chitty on Prerogative*, ch. 15,) it is said, “Acts of parliament which would divest or abridge the king of his prerogatives, his interests or his remedies in the slightest degree, do not, in general, extend to, or bind the king, unless there be express words to that effect.” This, however, it may be thought, is a prerogative which attaches to the crown, and is not to be claimed by the sovereign power here. This has not been the understanding of the law in the courts of the *United States*, or of sister States. See *4th Cowen*, 143. 18 *John.*, 227. 1 *Watts*, 54. 4 *Mass. Reports*, 528. 2 *Mason*, 314. 4 *Mason*, 427, and other authorities collected by *Judge Hopkinson*, in support of his own opinion, to be found in the *American Law Journal*, November 1849, p. 204.

That some of the royal prerogatives of England belong to the State, as branches of the common law, may be seen by reference to the case of *The State of Maryland vs. The Bank of Maryland*, 6 *G. & J.*, 205. Other cases of our own courts might be cited.

In the case of *The People, vs. Rossiter*, 4 *Cowen*, 143, the court remarked, “the people,” (here it would be said, the State,) “are not bound by any act of this kind, unless they are named

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in it, and the people are the king, for the purpose of this rule.”

This to be sure, is sometimes called a prerogative right, but *Justice Story*, in *2nd Mason*, 312, said, “it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments;” and founds the rule in the great public policy of preserving the public revenues and property from loss and injury, by reason of the negligence or mistake on the part of public servants.

In the same case he remarked, “general acts of the legislature are meant to regulate and direct the acts and rights of citizens, and in most cases, the reasoning applicable to them applies with very different, and often contrary force, to the government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.” See also, *1st Kent*, (3rd Edition,) 46.

In construing the act or acts of Assembly, now under consideration, we are to gratify the intent of the legislature; to find in these laws the whole meaning, but nothing more than the meaning of the makers of them. “The real intent, when ascertained, will always prevail over the literal sense of terms? If the words do not exclude doubt, the intention is to be collected from the occasions and necessity of the law.”

Looking at the objects and provisions of these acts of Assembly, it can scarcely be believed that the legislature designed by these laws to deprive the State itself of its right of action against the collector of its taxes and his securities; and this, because, by reason of the carelessness or ignorance of its public agents, the bond required of him, was taken on paper, not stamped.

Indeed the construction here to be combated, would make the law, if not absurd, most unreasonable. If an individual omits to provide a stamp before the execution of the bond, he may afterwards procure it to be stamped, and thereby made

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valid by paying the sum of money, and making the affidavit, which the act of Assembly prescribes. This provision is made for the benefit of every other obligee, whose bond is without the necessary stamp. But how preposterous it would be, to require the State to pay to itself the tax imposed, in order to give validity to a bond like that under consideration?

The State is often preferred to individuals; the latter are never preferred to the former. That would be a most absurd construction of these laws, which would secure to any other obligee, (be he citizen or foreigner,) and at the same time to deny to the State the right to make a bond, although not stamped before its execution, evidence in its courts, and yet such would be the case if the notion here combated, be correct, inasmuch as the law has omitted to dispense in any case with the oath, and in the case of a bond to the State, has authorised no person to take the oath for the State. Indeed, as the collector himself furnished the bond already executed, no other person could safely take the oath which is required, and of course if authorised, he would not take it.

“Independently,” said the judge, in the *United States vs. Hoar*, (2 Mason,) “of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, *founded upon the legislative intention*. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorised to put such an interpretation upon any statute.” It could not have been the intent of the legislature to avoid any bond of this description, unless it be stamped. The law has not “plainly said so,” and there being no such “clear intention,” the court cannot so decide.

Sometimes in acts of Assembly, there is what is called a saving of the State’s right, an exception in favor of the State. Such is the case in *England*, but this is only *ex abundanti cautela*, and not of necessity. *Showers Parla. Cases*, 179.

Independently then of the rule of interpretation, which is de-

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signed in many (not in all) cases, to exempt the sovereign power from the operation of laws, it would seem to be impossible to find in this law a legislative intention, that bonds of this description, unless with the proper stamp, should not be evidence in our courts.

A majority of the court being of the opinion, that in the judgment of the court below overruling the demurrer to the second plea, there is error.

JUDGMENT REVERSED WITH COSTS, AND
PROCEDENDO AWARDED.

THOMAS ANDERSON vs. REBECCA GARRETT AND OTHERS.
June 1850.

By the law of this State, as far as regards liberation from slavery a negro is regarded as the slave of him by whom he is held in bondage until his right to freedom is established by the judgment of the court competent to try such right.

By the act of 1796, ch. 67, sec. 21. the county court of that county in which the petitioner or petitioners shall reside, under the direction of his, her or their master or mistress, or owner, are exclusively vested with the power of trying the petition for freedom.

In acquiring a residence the slave has no will of his own; his acts unauthorised by his master and his volition, form no ingredient in the constitution of his residence; its creation and continuance depend entirely upon the acts and intentions of the owner, whose power of changing it at his will and pleasure rests entirely in his own discretion.

A master apprehending that a family of slaves whom he had permitted, for nearly eighteen years, to live and reside in the city of *Baltimore*, acting as free persons, were about to abscond, seized, and forcibly carried them to another county, beyond the jurisdiction of *Baltimore* county court. **Held:** that he had a perfect right thus to change the residence of his slaves, and the court from whose jurisdiction they were thus taken, could not entertain their petition for freedom.

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If a master, hearing that his slave is about to file his petition in the county in which he resides, and knowing that the evidence necessary to maintain the petition can be conveniently obtained only in that county, should, in fraud of the jurisdiction of its court, and to prevent a fair and impartial trial of petitioner's claim, remove him to another county, in such case the court of the former county may exercise jurisdiction, and proceed on the petition as if no such removal had been made.

Upon a suggestion for the removal of a petition for freedom, under the 3rd section of the act of 1810, ch. 63, the county court in determining on the sufficiency of the suggestion, is confined to the competent testimony offered in its support, and cannot receive any evidence offered by the opposite party.

The clause of this act which requires the petitioner to be "actually held in bondage" by the person claiming to be owner, and asking for the removal, means a holding in bondage, *in point of fact*, and not a mere legal or constructive holding.

Where the suggestion and affidavits thereto proved that the master actually held in bondage *but one* of the petitioners, while of the others he held only a legal or constructive holding, it was HELD, that the county court properly overruled the suggestion for the removal of the petition of *all* the petitioners.

Though the county court may err in permitting an immaterial and impertinent question to be asked of a witness, and answered, yet if it does not appear to this court that it had any influence on the jury in their finding on the issues, the judgment will not, for this reason, be reversed.

A testatrix desired all her negroes to be liberated, and declares that they are, "by this my will, liberated and set free in the manner and form following:" She then enumerates three who are to be free at her death, and then proceeds, "my negro woman *Beck*, and my negro man *Basil*, to be free at the expiration of four years from the date of my decease," and then enumerates others who were to be free with their increase at the age of twenty-five years. HELD: that the issue of *Beck* have no claim to freedom under this will.

A testatrix executed her will in 1804, and appointed an executor, but desired that no letters of administration be taken out on her estate. HELD: that the isolated fact that the person named as executor sold the rest of the negroes, except the petitioner, belonging to her estate, is not evidence legally sufficient to warrant the jury in finding that such executor acted under letters testamentary, legally granted.

A negro's going at large and acting as free for any length of time, will not, *per se*, be a sufficient foundation to presume a deed of manumission.

No presumption of a deed of manumission is authorised as a matter of law, to be declared by the court, or as a matter of fact to be found by the jury, upon the mere ground that a slave has gone at large and acted as a free-

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man, with his master's knowledge, unless such going at large and acting as if free, be for a period of at least twenty years uninterrupted duration. Abandonment of a slave by the owner, is not a legitimate mode of manumission in this State, nor is it, *per se*, a sufficient foundation for the presumption of a deed of manumission.

An executor as such, has no power in this State to execute a deed of manumission, and no presumption of law or fact that such deed was executed by an executor, can ever arise.

Where a party has pleaded to the jurisdiction, and taken a bill of exceptions to the overruling of the plea, and then offers a prayer to the court founded on the same reasons on which the plea was based, the court is not bound to reiterate its decision, and the refusal to make it by the court's rejecting the prayer, is no ground for reversal of its judgment.

APPEAL from *Baltimore* county court.

Rebecca Garret and her five children, by *B. C. Presstman*, their next friend, filed their petition for freedom in *Baltimore* county court, on the 8th of March, 1849, alleging that they were in the custody of *Thomas Anderson*, of *Howard* district, having been forcibly taken from the jurisdiction of said court by *J. C. Anderson*, as agent of said *Thomas*, and that they are entitled to their freedom, which they pray may be inquired of by said court.

The defendant, *Thomas Anderson*, appeared and pleaded in abatement to the jurisdiction of the court, averring that the petitioners did, at the time of filing their petition, and long before, reside under the directions of the defendant, their master and owner, at *Howard* district of *Anne Arundel* county, out of the jurisdiction of said court. This plea was verified by affidavit, and submitted upon the testimony which had been given in the case of an application for a writ of *habeas corpus*, made by the petitioners against one *J. S. Donovan*, and which it was agreed should be regarded as given in this case, and the facts thereby proved, should be taken as the statement of facts, upon which the question of jurisdiction is to be decided.

This testimony shows on the part of the petitioners, that *Rebecca Garrett*, the mother, came to *Baltimore* about eighteen years ago, where she has continually resided with her children till within a short period prior to the filing of this peti-

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tion. That during all this time she was reputed a free woman, and always acted as such, making contracts, renting houses, hiring herself out and receiving her own wages, hiring out her children and receiving pay for their services, and raising and supporting her family by her own industry. That shortly before the filing of their petition, *Isaac J. Anderson*, the son of defendant, with several police officers, came to the house of petitioners at night, seized and hand-cuffed them, and carried them off the the residence of defendant, in *Howard* district.

On the part of the defendant, it was proved that he claimed the petitioners as his slaves, the mother, *Rebecca*, having been given to his wife at five or six years of age. That he had permitted them to live as they had for many years, until recently, when having heard that one of them was about to escape into *Pennsylvania*, he did, acting under the advice of counsel, seize and take them into his possession as stated above. That immediately upon doing so, he addressed a letter to petitioners counsel, stating that *Howard* district court was about to sit, and inviting him to bring suit for freedom in that court. Upon this evidence, the court, (FRICK, C. J., and LE GRAND, A. J.,) overruled the plea and directed the defendant to answer over, to which judgment the defendant took his first exception.

2ND EXCEPTION. The defendant then filed a suggestion in writing for removal, stating “that about twenty years ago, he held the said *Rebecca* in possession in *Howard* district of *Anne Arundel* county, (then *Anne Arundel* county,) as his slave for life, that not having constant employment for her, he permitted her to live with her husband, one *William Garrett*, a free negro. That several years afterwards, said *William Garrett* being about to remove to the city of *Baltimore*, *Rebecca* applied to defendant for permission to accompany her husband. That defendant for some time refused to let her go, but afterwards agreed to hire her to her husband, and he took her with him to reside in the city of *Baltimore*. That by this agreement, the said *William Garrett* promised to pay a certain sum, yearly, for the services of *Rebecca*, and defendant reserved to himself the right at any time, to take and remove

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her, or any child or children she might afterwards have, from the possession of the said *William Garrett*, without any previous notice. That all the petitioners mentioned as the children of said *Rebecca*, were born after this agreement was made. That for several years the said *William Garrett* continued to pay the sum stipulated in the agreement, but defendant, in consideration of the expense and trouble of supporting his large family of children, did not exact afterwards the payment of the same from him. That defendant frequently supplied *Rebecca* and her children with provisions and whatever else necessary to their support, his farm afforded. That all the said petitioners were thus held in actual bondage by defendant. That petitioners resided in the city of *Baltimore* by permission of defendant, their owner. That defendant was not at the time of filing said petition, and never has been a resident of *Baltimore* county, but always has resided in *Howard* district of *Anne Arundel* county. The defendant, therefore, prays your honors to order and direct the record of proceedings on said petition to be transmitted to the court of *Howard* district of *Anne Arundel* county.”

This suggestion was verified by the affidavit of the defendant, and also by that of *J. C. Anderson*, who swore that he was present when the agreement between defendant and *William Garrett* was made. It was then agreed upon the hearing of this motion for removal, that the testimony already on file in the case, (being that upon which the plea to the jurisdiction was submitted,) may be read in evidence, subject to legal exceptions. The defendant then offered to support his suggestions by the oral testimony of said *J. C. Anderson*, but the court decided that the oral examination was unnecessary. The motion was then submitted and overruled by the court, to which defendant excepted.

The defendant then pleaded. 1st. That petitioners were not free. 2nd. That they are not lineally descended in the female line from a free woman. And upon these pleas, issues were joined. The case was then tried, and the petitioners on their part, first proved substantially the same facts as those upon

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which the plea to the jurisdiction was submitted, and then offered in evidence the will of *Sarah Cord*, executed on the 10th of September, 1805, containing among others the following clause.

“*Item.* My will and desire is, that all my negroes be liberated and set free, and is by this my will liberated and set free from bondage, in the manner and form following: that is to say, that my negro man *Tom*, my negro man *Joshua*, and my negro woman *Phebe*, be free to all intents and purposes, from the date of my decease; my negro woman *Beck*, and my negro man *Basil*, to be free at the expiration of four years from the date of my decease, my negro boy *Levi*, my negro boy *David*, my negro girl *Seny*, my negro girl *Mariah*, my negro girl *Elizabeth*, my negro girl *Matilda*, my negro boy *Elias*, my negro child *William*, all and each of them to be free when they arrive at the age of twenty-five years, them and their issue or increase forever.”

The testatrix appointed her son, *John Cord*, her sole executor, and desired that no letters of administration should be taken out on her estate, but that her will should be proved and lodged in the register of wills office for *Anne Arundel* county, and there be recorded.

The petitioners further proved that *Rebecca Garrett*, the petitioner, was the daughter of *Beck*, mentioned in this will, and was claimed as well as the other negroes named therein as *Mrs. Cord's*. And further, that *John Cord*, named as executor of *Sarah Cord*, sold the rest of the negroes.

Defendant then proved, by *W. H. G. Dorsey, Esq.*, that he had carefully examined the records of the register of wills' office, of *Anne Arundel* county, where said *Sarah* lived and died, and where her property was, for letters testamentary, or of administration on her estate, and found that none had been ever granted to any one.

It was then agreed that this evidence shall be made part of each exception of plaintiff or defendant.

3RD EXCEPTION. In the course of the trial, the defendant having asked a witness whether the petitioner was not married,

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and had a husband, to which witness answered, that she had, and his name was *William Garrett*, the counsel for petitioners then proposed to ask the witness what was the character of said husband, to which defendant objected; but the court overruled the objection, and allowed said question to be asked, which was asked, and the witness answered the question to the jury, to which opinion of the court the defendant excepted.

4TH EXCEPTION. The plaintiffs and defendants having given the evidence as stated above, the petitioners made the following prayers:

1. That if the jury find that the petitioner, *Rebecca Garrett* was the slave of *Sarah Cord* at the time of her death, and that said *Sarah* before her death, duly made and executed the last will and testament, given in evidence, and that said *Rebecca*, at the time of the death of said *Sarah*, was under forty-five years of age, and capable to earn a sufficient livelihood, and that the other petitioners are the children of said *Rebecca*, born since the death of said *Sarah*, then petitioners are entitled to their freedom.

2. If the jury find that *Sarah Cord* made her will as stated in the preceding prayer, and that *Rebecca*, one of the petitioners, and mother of the others, is the daughter of negro woman *Beck*, mentioned in said will, then petitioners are entitled to their freedom.

4. If the jury find that *Sarah Cord* made her will as stated in the first prayer, and by said will appointed *John Cord* the executor thereof; and that said *John Cord*, after the death of *Sarah*, and in or prior to the year 1819, sold personal property left by the said *Sarah*, and acted in reference to said property as executor. The jury may presume, from the lapse of time and all the evidence in this case, that said *John Cord* had acted under letters testamentary upon the estate of *Sarah*, legally granted to said *John*. And they may further presume, from the lapse of time aforesaid, and all the other circumstances in this case, that the estate of said *Sarah* was fully administered, and all debts paid. And if the jury find from all the circumstances in the case, that the petitioner, *Rebecca*, openly and

publicly acted for herself as a free person,—making contracts as such for a period of twenty years, or any *considerable* length of time less than twenty years, without the interruption of any one; and also find the aforesaid *John Cord*, having knowledge of her so acting, nor any one else adopted any steps to claim her as a slave: and shall further find that the children of the said *Rebecca*, acted under the direction and control of said *Rebecca* as free persons; and that no attempt was made by *John Cord*, or any one else, to claim them as slaves, then the jury may find that they are abandoned, and allowed to go at large as free persons, without any claim to them as slaves; and if the jury find these facts, these petitioners are entitled to their freedom.

And the defendant the following prayers:

1. If the jury believe that *Rebecca Garrett*, the petitioner, was the slave of *Sarah Cord*, (whose will has been given in evidence by the petitioners,) and the daughter of *Beck*, named in said will; and if they further find that all the other petitioners are the children of said *Rebecca*, and were born since the death of said *Sarah*; and if they further find that no letters testamentary or of administration had ever been granted, upon the estate of said *Sarah*, then the petitioners are not entitled to their freedom, and their verdict must be for defendant.

2. If they find that defendant always resided in *Anne Arundel* county, and at the time of filing this petition, the petitioners were held in custody in *Anne Arundel* county as slaves, then this petition cannot be sustained in this court.

The court granted the fourth, and rejected the first three prayers of petitioners, and refused to grant the prayers of defendant, and instructed the jury that they are at liberty to infer, from all the circumstances in the case, that letters of administration were granted on the estate of *Mrs. Cord*, and that her estate has been duly administered, and all its debts paid. To which opinions, and each of them, the defendant excepted.

The verdict and judgment being for petitioners, the defendant appealed. The record does not show, that any prayer called the 3rd prayer, was ever offered by the petitioners.

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The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MAGRUDER, and MARTIN J.

By WM. H. G. DORSEY, for the appellant, and
By NELSON and PRESSTMAN for the appellees.

DORSEY, C. J., delivered the opinion of this court.

The first question presented for review in this court, by the record before it, is, did *Baltimore* county court err in overruling the plea in abatement to its jurisdiction, filed by the appellant, to the appellees' petition for freedom? The plea alleges that each and every of the petitioners did, at the time of filing said petition, and long before, reside, and have ever since resided, under the direction of the said *Thomas Anderson*, their master and owner, out of the jurisdiction of *Baltimore* county court, and in *Howard* district of *Anne Arundel* county. By the law of *Maryland*, as far as regards liberation from slavery, a negro is regarded as the slave of him by whom he is held in bondage, until his right to freedom is established by the judgment of the court, competent to try such right. By the act of 1796, ch. 67, sec 21, the county court of that county in which the "petitioner or petitioners shall reside, under the direction of his, her, or their master or mistress, or owner," are exclusively vested with the power of trying the petition for freedom. That the petitioners at the time of filing their petition and for some time before, resided under the direction of the appellant their assumed owner, in *Howard* district of *Anne Arundel* county, are facts stated in the plea in abatement, and are not traversed or disproved, but on the contrary are fully established by the proof in the cause.

In acquiring a residence by a slave, he has no will of his own. Neither his acts unauthorised by his master, nor his volition form any ingredient in the constitution of his residence. Its creation and continuance depend entirely upon the acts and intentions of the owner, whose power of changing at his own will and pleasure the residence of the slave, is a matter resting entirely in his own discretion. In *Johnson vs. Tompkins*, 1

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Baldwin's Rep., 577, (a case involving the rights and powers of slave-owners) *Justice Baldwin* of the Supreme Court of the *United States*, says: "As a consequence of the right of property, the owner may keep possession of his slave; if he absconds he may retake him by pursuit into another State, and may bind or secure him in any other way to prevent his second escape; he may arrest him by the use of as much force as is necessary to effect his reclamation; he may enter peaceably on the property or into the house of another, taking care to commit no breach of the peace against third persons. But it is no breach of the peace to use as much force or coercion towards the fugitive as suffices for his security; as without such force no slave could be retaken without his consent. The master may also use every art, device or stratagem, to decoy the slave into his power; odious as these terms may be in their application to an unlawful act, they ought to be considered as far otherwise when used for a lawful and justifiable purpose." If these powers exist in the master in regard to a fugitive slave, (as they unquestionably do,) they are equally inherent in him, when he seeks to change the residence of his slave, or to obtain a more secure possession of him, or when acting under an apprehension of his design to abscond.

In overruling the appellant's plea, in abatement and awarding a *respondeat ouster*, we think *Baltimore* county court erred, for which error its judgment must be reversed. And there being no jurisdiction in that court according to the express provision of the act of 1795, to entertain the petition before it, no *procedendo* can be awarded.

From the preceding remarks of this court, it is not to be understood as having decided, that in no case can a petition for freedom be sustained in a county court, other than that in which the petitioner resided at the time of filing his petition. A case may well be imagined, where such a right would be sustained. As for example, where it appears that a master, having given residence to his slave in county A. for instance, upon being informed that he is there about to file his petition for freedom, and knowing that the evidence necessary to maintain the peti-

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tion can be conveniently obtained only in that county, and having no sufficient reason to believe that a fair and impartial trial cannot there be had, in fraud of the jurisdiction of the court of the county A, and to prevent a fair trial of the claim of the petitioner, removes him to another county; in such a case the county court of A, might exercise its jurisdiction and proceed on a petition for freedom in the same manner as if such change of the residence of the slave had never taken place. But such is not the case now before us appearing either in the petition or proof.

The decision thus expressed upon the first bill of exceptions would, as it might well have done, have terminated the duties of this court in relation to the case now before it. But the legislature of *Maryland* having required our decision on all the bills of exceptions, taken in the case, we now proceed to the discharge of the remaining portion of the duty thus imposed upon us.

The second exception of the appellant is taken to the overruling of his suggestion made under the act of 1810, chapter 63, sec. 3, for the removal of the cause to the court of *Howard* district of *Anne Arundel* county. The suggestion being made upon oath, and "supported by competent testimony," it was submitted to the county court, under an agreement of the parties, containing a provision, "that the testimony already on file in this cause may be read in evidence subject to legal exceptions." Under this submission "the testimony already on file" being subject to legal exceptions, was inadmissible. The court below in determining on the sufficiency of the suggestion for the purpose for which it was offered, is confined to the competent testimony offered in its support, and cannot receive any evidence upon the subject offered by the opposite party. To warrant the removal under the suggestion, the act of Assembly requires that the person, "claiming to be the owner of the said petitioner, had *actually* held the said petitioner in bondage." In construing this clause of the act of Assembly, if we can do so, consistently with its general intent, we ought to give some import to every word used in the enactment. "Actually held

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in bondage," was intended to mean something more than a mere legal or constructive holding in bondage; it means a holding in bondage in point of fact. The suggestion and affidavits thereto, prove, that as a matter of fact, the appellant had actually held in bondage the petitioner *Rebecca*, but not her children, the other petitioners, within the contemplation of the act of Assembly. Of them he had but a legal, a constructive holding in bondage. Had the appellant in his suggestion prayed for the removal of *Rebecca Garret's* case only, it ought to have been granted by the court below. But having prayed for the removal of the petition of all the petitioners, for the reason we have stated, we think the county court did not err in its general overruling of the appellant's suggestion.

The ruling of the county court excepted to, is thus briefly stated in the appellant's third bill of exceptions. "The defendant having asked of the witness whether the petitioner was not married, and had a husband, to which the witness answered that she had, and his name was *William Garrett*. The counsel of the petitioners then proposed to ask the witness, what was the character of said husband, to which the counsel for defendant objected; but the court overruled the objection, and allowed said question to be asked, which was asked, and the witness answered the question to the jury, and to which opinion of the court the defendant, by his counsel, excepted," &c.

The bill of exceptions does not disclose for what purpose the question objected to was asked, and there is nothing in the record from which this court can infer its pertinence or materiality to the issues before the jury. It ought, therefore, to have been rejected by the county court as an immaterial and impertinent question. But although the county court erred in permitting the question to be asked and answered, yet, as it does not appear to us that it could have had any influence on the jury in their finding on the issues in the cause, it forms no ground for the reversal of the judgment of the court below.

We concur in opinion with the county court, that by the last will and testament of *Sarah Cord*, the petitioner, *Rebecca Garrett*, was not manumitted. The testatrix declares, that

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her negroes are, by her will, “liberated and set free, in the manner and form following, that is to say: my negro man *Tom*, my negro man *Joshua*, and my negro woman *Phebe*, to be free, to all intents and purposes, from the date of my decease; my negro woman *Beck*, and my negro man *Basil*, to be free at the expiration of four years from the date of my decease; my negro boy *Levi*, my negro boy *David*, my negro girl *Semy*, my negro girl *Mariah*, my negro girl *Elizabeth*, my negro girl *Matilda*, my negro boy *Elias*, my negro child *William*, all and each of them to be free, when they arrive at the age of twenty-five years, them, and their issue or increase, forever.” On reading this will, that the testatrix designed to enumerate all the slaves on whom manumission was conferred, and to prescribe the periods at which the manumission of each was to take effect, we regard as a proposition too manifest on the face of the will to admit of controversy. Some of them were to be free at her death, some four years afterwards, and some with their issue or increase, as they should respectively arrive to the age of twenty-five years. As to the issue of her negro woman *Beck*, who was to be free four years after the testatrix’s death, she has made no provision, and, consequently, under her will, they have no claim to freedom. Had she designed it, she would have so declared in her will, and would, as she did in every other instance, have specified the period at which emancipation was to commence. Our province is not to speculate as to intention, and give efficacy to bequests not expressed in the will, but to declare its true intent and meaning, upon a fair interpretation of the terms and expressions which it contains.

The appellant’s fourth bill of exceptions raises various questions as to the correctness of the ruling of the county court in granting the fourth prayer of the appellees, and rejecting the two prayers made by the appellant, and in instructing the jury, that they were “at liberty to infer from all the circumstances in the case, that letters of administration were granted on the estate of *Mrs. Cord*, and that her estate had been duly administered and all its debts paid.” In granting the fourth prayer of the petition-

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ers, the county court erred, in the opinion of this court, for various reasons, any one of which we deem sufficient to have prevented the prayer being granted in its entirety. The first error deemed necessary to be mentioned, is presented by the first and second sentences, (according to its punctuation,) of the petitioners' fourth prayer, which are in these words: "If the jury find from the evidence in the cause, that *Sarah Cord* made her will, as stated in the first prayer, and by said will appointed *John Cord* the executor thereof; and that said *John Cord*, after the death of *Sarah*, and in or prior to the year 1819, sold personal property left by said *Sarah*, and acted in reference to said property as executor. The jury may presume, from lapse of time and all the evidence in this case, that said *John Cord* acted under letters testamentary upon the estate of *Sarah*, legally granted to said *John*." The only evidence upon which the jury were authorised to find this presumption was, the will of *Sarah Cord*, and the proof of *Beal Stinchcomb*, which, as regards this question, is as follows: "that *John Cord*, named as executor of *Sarah Cord*, sold the rest of the negroes," except *Beck*, the petitioner. But in what character *John Cord* sold the negroes; at what price they were sold; whether the sales were consummated by payment of the purchase money; whether the negroes sold were ever delivered to the purchasers, and if so delivered, for what length of time they remained in their possession; and whether *John Cord* paid the debts of the deceased, or otherwise administered her assets, are facts for the ascertainment of which the proof in the cause furnishes no solution. There is no evidence that any inventory was ever returned to the orphans court of *Anne Arundel* county, or any account of the executor settled before it, or that it ever passed any order; or that any proceeding was ever had before it recognising *John Cord* as the executor of the deceased. The exhibit of the will and the isolated fact, that "*John Cord*, named as executor of *Sarah Cord*, sold the rest of the negroes," is not evidence legally sufficient to warrant the jury in finding that "*John Cord* acted under letters testamentary upon the estate of *Sarah*, legally granted." And such a presumption is strongly repelled by

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the provision in the will of the testatrix, "that no letters of administration be taken out on her estate." Under all the circumstances of the case, the only rational conclusion at which the jury could, with any certainty, arrive, was that no letters testamentary had been granted.

It hence results, that the court erred in granting the third sentence of the prayer: "That the jury may further presume from lapse of time aforesaid, and all the other circumstances in this case, that the estate of said *Sarah* was fully administered and all debts paid." There having been no letters testamentary granted, no such presumption can legally arise.

The fourth sentence of the fourth prayer is as follows: "And if the jury find from all the circumstances in this case, that the petitioner *Rebecca*, openly and publicly acted for herself, as a free person; making contracts as such, for a period of twenty years, or any considerable length of time less than twenty years without the interruption of any one; and also find the aforesaid *John Cord* having knowledge of her so acting, nor any one else adopted any steps to claim her as a slave; and shall further find that the children of the said *Rebecca*, acted under the direction and control of said *Rebecca* as free persons; that no attempt was made by *John Cord* or any one else to claim them as slaves; then the jury may find that they are abandoned and allowed to go at large as free persons, without any claim to them as slaves: and if the jury find these facts, these petitioners are entitled to their freedom." In granting this last sentence of the fourth prayer, we conceive there is error, upon several distinct and independent grounds. The facts stated in the affidavit for the removal of this case from *Baltimore* county court to the court of *Howard* district of *Anne Arundel* county, are not in evidence, and for our consideration upon the questions before us, under the appellant's fourth bill of exceptions. There was proof before the jury that the petitioner *Rebecca Garrett*, was part of the personal estate of *Sarah Cord* at the time of her decease; and there is no evidence to show she was then the property of any other person. There was no evidence to show that *John Cord* ever entered

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into any contract by which *Rebecca Garrett* was to be free, or was intended so to be; or that by word or deed (other than her going at large as a free person, as the prayer puts it to the jury to find, with his knowledge,) recognized her to be such. There is a total absence of all such facts as taken in connection with the actual enjoyment of the right claimed, have in somewhat analogous cases been deemed sufficient to authorise a jury in finding, or presuming, the existence of a deed, conferring the right, where the time of its actual enjoyment has been for a less period than twenty years. This court have said in *Burke vs. Negro Joe*, 6 *Gill and John.*, 136, that “negro’s going at large and acting as free for any length of time, will not *per se*, be a sufficient foundation to presume a deed. Because he might be in that situation without the knowledge of his owner, or there might be no person legally authorised to claim him,” or, it might have been added, that the owner might have been unsuccessful in his reasonable efforts to assert his rights, or that the place or circumstances under which the slave acted as a free man, excused him from making the usual efforts to reduce him to bondage. We regard it as a principle equally clear with that referred to in 6 *Gill and John.*, that no presumption of a deed of manumission is authorised as a matter of law to be declared by the court; or as a matter of fact to be found by the jury, upon the mere ground that a slave has gone at large and acted as a free man with his master’s knowledge, unless such going at large and acting as if free, be for at least twenty years uninterrupted duration. The county court, therefore, erred in declaring that the petitioners were entitled to their freedom had they thus gone at large as free for any time less than twenty years. It erred also in saying that freedom was so consummated by “any considerable length of time less than twenty years.” The word, “considerable,” when thus used, being a term of too indefinite import to be left to the finding of a jury, and tending to confuse or mislead them. One juror might deem six months, another six years, another ten years, another sixteen years, as the considerable length of time within the meaning of the county court; and thus the obvious tendency

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of granting the prayer, would be to distract and mislead the jury. The giving the prayer was also wrong, because it submitted to the finding of the jury a knowledge in *John Cord*, without a particle of testimony having been offered to show it.

The conclusion of the prayer, (which asserts the freedom of the children of *Rebecca*, because they acted as free persons under her direction and control, without any attempt by *John Cord* or any one else to claim them as slaves; and that the jury might thence find that they were abandoned,) is also erroneous. It warrants the jury in saying that the negroes are abandoned and free, although *John Cord*, had no knowledge of their ever having acted as free persons. What import the author of the prayer designed to give to the word "abandoned," does not perhaps very distinctly appear. But if it meant to assert that abandonment by the owner of a slave that he might be free, is, *per se*, a legitimate mode of manumission in *Maryland*, it is a proposition as novel as it is contradictory to the express provisions of our act of Assembly upon the subject. A man may to day abandon his slave as free, and to morrow take possession of him, and his title to him is as unquestionable as if no such abandonment had ever been made. In *Maryland* the law recognizes but two modes of manumission; the one by last will and testament, the other by deed, duly executed, acknowledged and recorded. It is true, such deeds of manumissions, are sometimes presumed to exist without their production, but abandonment, *per se*, is no sufficient foundation for such a presumption.

This prayer, however, is radically wrong, upon another ground than those which have been stated. An executor has no power, as such, in this State, to execute a deed of manumission; it would be a palpable violation of his duty; a fraud upon the creditors or representatives of the testator, which the law would not tolerate. No presumption either of law or fact, that such a deed was executed by the executor can ever arise, or give to petitioners a title to freedom.

From the preceding part of this opinion, it is apparent, that the appellant by his first prayer having asked less, and but a part of what he had a right to demand at the hands of the

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county court, there is error in its not being granted. That this court dissent from the instruction given by the county court, is shown by its decision on the third sentence of the fourth prayer of the petitioners. The appellant having, for the same reasons assigned in his second prayer, why the petition should not be sustained, pleaded to the jurisdiction of the county court, and that plea being overruled by the court, and a bill of exceptions taken by the appellant to its ruling, it was not bound to entertain a prayer, the only effect of which would have been the reiteration of a decision already pronounced by the court, and from which a bill of exceptions had been taken. By such reiteration no additional injury would have been inflicted on the appellant, and the court's refusal to make it by rejecting the prayer, forms no ground for the reversal of its judgment. If the court can be required again and again to reiterate its decision upon the same point, there would be no end to litigation, and a trial might be procrastinated almost indefinitely.

We concur with the county court in overruling the appellant's suggestion for a removal of the cause, as stated in his second bill of exceptions, and also in refusing to sustain his second prayer as stated in his fourth bill of exceptions, but dissenting from its rulings in the first and residue of the fourth bill of exceptions, and its instruction given to the jury as stated in the fourth bill of exceptions, its judgment is reversed and no *procedendo* will be awarded.

JUDGMENT REVERSED.

JOHN R. GWYNN AND CHARLES R. GWYNN, TRADING UNDER
THE FIRM OF GWYNN & Co., vs. JOSIAH LEE AND OTHERS.
June 1850.

A *bona fide* holder of a negotiable note for a valuable consideration, without notice of facts which affect its validity as between antecedent parties, if he

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takes it by endorsement before it becomes due, acquires a valid title and may recover upon it, although, as between antecedent parties, the transaction may be invalid.

The defendant received a negotiable note, as security for the payment of money borrowed at the time, of him, by the endorsers of the note, without notice that it had been fraudulently obtained from the makers. **Held**, that he could recover upon it.

Before the makers can ask relief in equity against such a note, they must show that they have a defence of which they cannot avail themselves at law.

The defendant is not bound to exhaust his remedies against other securities, placed in his hands at the same time for the same debt, before he can enforce payment of such note.

It is no defence that the debt for which the note was pledged as security was tainted with usury; the makers of the note cannot, for this reason, avoid the contract.

Before the act of 1845, ch. 352, if the debtor, or any person who had a right to represent him, asked in chancery to be relieved from the payment of any usurious debt, the principal and legal interest must be paid.

This act will not permit any person to avoid the contract in any suit, whether in law or in equity; the principal and legal interest are still due and to be paid, and the creditor is entitled to all the securities which he has, just as if, by the original terms of the contract, it had been to pay the principal, with legal interest.

APPEAL from the *Court of Chancery*.

The facts of this case are fully stated in the following opinion of the chancellor, (JOHNSON,) accompanying his order dissolving the injunction obtained by the appellants, the complainants below.

“ This cause, though not very important with reference to the amount involved in its decision, is yet not destitute of interest to the commercial community.

It appears, that some time in the month of April, 1848, the complainants, trading under the firm of *Gwynn and Company*, placed in the hands of *George Baughman*, of the firm of *Baughman, Nicholson and Cannon*, their promissory note for \$1,227.33, made payable to the last named firm, dated the 9th day of that month, and payable eight months after date, and, as the complainants allege, the note so made and delivered by them to *Baughman*, was made and delivered upon the offer

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and agreement of *Baughman* to procure the same, to be discounted for their use at some bank in *Baltimore*. *Baughman* did not comply with this alleged agreement, but on the contrary, on the 11th of September, 1848, three months before the maturity of the note, the firm of which he was a member, borrowed from the defendant *Lee* \$21,000, and lodged, and hypothecated with him, as security for the re-payment of the money, this note, with many others, a list of which is given in his answer. Of these notes, it appears some have matured and remain unpaid, and that others have not yet matured, so that a considerable portion of the money loaned is still due.

There is nothing to show that *Lee*, the defendant, had any knowledge or any reason to suspect when he received this note as stated, that it had been procured by fraud or misrepresentation, or was without consideration, and in his answer he expressly denies, that he had any such knowledge or suspicion, and denying all belief in the allegations of the bill charging such fraud and want of consideration, the defendant avers himself to be a *bona fide* holder of the note, for a full and valuable consideration, and without notice.

The bill charges, that the note was pledged by *Baughman*, *Nicholson and Cannon*, to the defendant *Lee*, to secure the payment of a large sum of money which they had borrowed of him, and upon which he charged and exacted from said firm usurious interest. The bill does not allege that the defendant knew of the circumstances under which the note was given to *Baughman*, nor does it charge that complainants gave *Lee* notice thereof, until after he had received the same from the payees, as security for the loan made to them, nor is there any allegation that steps were taken by the complainants, by publication or otherwise, to caution the public against taking the note. It is charged, that to secure the money borrowed by *Baughman*, *Nicholson and Cannon*, from the defendant, they pledged with him securities to a larger amount than the loan, and the bill insists, that *Lee* is bound, before he can proceed against the complainants upon their note, to apply and exhaust the other securities. In answer to this charge the respondent

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says, that several of the makers of the other notes pledged to him have refused to pay them, and that some of them insist, that they were lent to *Baughman, Nicholson and Cannon*, and that after defendant is repaid his loan, with interest, they are entitled to share in the surplus, if any there be. The complainants further in their bill insist, that even if the defendant can hold said note as a security at all, it can only be for so much as might be due him, after deducting all the interest paid him by said firm on all their transactions, over and above the interest allowed by law, and they call upon the defendant to state the amount of such excessive interest paid within the period of the three last years.

In answer to this ground of equity, the defendant says, that the loan already spoken of for \$21,000, and a further loan to the same parties of \$4,000, on the 16th of August, 1848, and to secure the re-payment of which, other notes were hypothecated with the defendant, are the only two transactions of business he has with *Baughman, Nicholson and Cannon*. That he claims to hold these last notes, as also those pledged for the payment of the \$21,000, before mentioned, as security for the re-payment of the two sums, principal and interest, and such costs and expenses as he may incur by the resistance of the makers of the notes to pay the amount of their liabilities.

And denying the right of the complainant to interrogate him, or his obligation to answer to the charge of usury, the defendant says, "he was always ready and willing, and is now ready and willing, to surrender to the persons entitled to receive the same, all the securities which he holds upon the payment to him of the amount of *Baughman, Nicholson and Cannon's* indebtedness to him, with legal interest thereon, and the costs and expenses," &c. But he claims to hold the said securities until he is so repaid, and to adopt such measures as he may be advised, and as may be necessary to recover the sums due upon said securities, until he shall be reimbursed his principal legal interest, and costs and expenses.

The injunction which was ordered upon the filing of this bill, to restrain the defendant *Lee* from passing away the note

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of the complainants, or from suing them to recover the amount thereof, was not granted upon the alleged fraud charged to have been practised by *Baughman* upon the complainants in obtaining the note, because it was not charged that the defendant had any knowledge of such fraud or imposition at the time he received it, but upon the ground, as I understood the bill, that it was pledged with the defendant to secure a pre-existing debt, due from *Baughman, Nicholson and Cannon*, to him, the allegation being that it was placed with the defendant by those parties, "to secure the payment of a large sum of money which they had borrowed from him," which language was understood by me to mean, which they had borrowed prior to the pledge, and with that understanding I thought he might not be entitled to all the rights which attach to a party who had taken a negotiable security *bona fide* and without notice, and in the usual course of business. *Story on Promissory Notes*, sec. 195, note 1.

If *Baughman* committed a fraud or practised an imposition upon the complainants, that was a matter between him and them, with which the defendant *Lee* had nothing to do, and for which he could in no way be responsible, unless he had notice thereof when he received the note. *Baughman* was trusted by, and made the agent of the complainants, and if he abused their confidence, surely they, and not third parties, ignorant of the fraud, must bear the consequences, and their claim to the protection of the court was the weaker, seeing that after they discovered the imposition, they did not take the usual and proper course to warn the public, by advertising or in some other way. Unquestionably as between them and innocent third parties, who might obtain their note before its maturity, and in the ordinary course of business, there could not be a doubt as to who should bear the loss.

There can be no doubt that a *bona fide* holder of a negotiable instrument, for a valuable consideration without any notice of facts which affect its validity as between the antecedent parties, if he takes it by endorsement before it becomes due, acquires a valid title, and may recover upon it, although as be-

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tween the antecedent parties, the transaction may be invalid. "This is a doctrine," *Mr. Justice Story* says, "so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law." And as little doubt is there that the holder of such paper, before it is due, is not bound to prove that he is a *bona fide* holder for a valuable consideration, without notice, for the court will presume that, in the absence of rebutting proof. It is true, that if the other party has established the want, or failure, or illegality of the consideration, or that the note has been lost or stolen before it came to the possession of the holder, it may then become incumbent on him to show that he has given value for it, for under such circumstances, he ought not to be placed in a better situation than the prior parties through whom he obtained it. *Story on Promissory Notes*, secs. 195 and 196, and the note to these sections.

The question then is, has the defendant, *Lee*, shown for the purposes of this motion, that he has given value for this note? The answer says, speaking responsively to the bill, that upon the security of this note before it became due, and of other notes, a list of which is given, he, at the time he received it, loaned the holders twenty-one thousand dollars, and that he is a fair and *bona fide* holder for a full and valuable consideration without notice.

The argument of the complainant's counsel is, that as the charge of usury has not been answered, it must, upon this motion, be assumed to be true, and that consequently the defendant cannot be regarded as a *bona fide* holder for value, and the note being stated in the bill to have been procured by fraud, which statement must also, as it is said at this stage of the cause, be treated as true, the defendant is in no better situation than the prior party from whom he obtained it.

The defendant, it is true, does not deny the usury charged against him, insisting that he is under no obligations to do so, but he says he gave value for the note, and that he is now ready and willing, and always has been ready and willing to surrender the securities in his hands, including this note, upon

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the payment of the principal sum loaned by him, with legal interest and his costs.

The act of 1845, ch. 352, has made a material change in the law of this State upon the subject of usury. Prior to that act, and under the law of 1704, ch. 69, securities tainted with usury, were utterly void, and if the party lending money on usurious interest, attempted to recover it by legal or equitable proceedings, he would be wholly defeated on the fact of usury being established. Under that act, however, if the debtor applied to chancery for relief, he would only be relieved upon paying the principal sum due with the legal interest thereon. In other words, he would be required to do equity before he could ask for equity, which only required he should be relieved from the excessive interest.

But the act of 1845, extends the equitable principle, and provides, that in actions both at law and in equity, brought by the creditor upon the usurious instrument, the defendant, the debtor, shall be made to pay the principal debt with interest thereon, at the rate of six *per cent. per annum*. So that now, usurious instruments are not under any circumstances avoided, but are made valid securities in all courts, and no matter by whom proceedings may be instituted upon them, to the extent of the principal sum and six *per cent.* interest.

Can it be said then, assuming for the sake of the argument, that the defendant, *Lee*, contracted with *Baughman, Nicholson* and *Cannon*, for the payment of more than six per cent. interest, that he is not a holder for value of this note? His contract is not void, but is a good and valid contract to the extent of the sum loaned, and six *per cent.* interest, and that is all he claims. He says, and his answer is to be taken as true, being responsive to the bill, that he gave value for this note paid at the time he received it; and it is no answer to say that his contract with the parties from whom he received it, was usurious, because if true, that does not avoid the contract which is a valid security to the extent that he claims to recover upon it. He must therefore be looked upon as a holder for value, and entitled as such to avail himself of the note taken without notice, and before it was due to the extent he claims,

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It may be, that since the repeal of the 3rd section of the act of 1704, ch. 69, which inflicts a forfeiture for usury, a defendant cannot excuse himself from answering the charge of usury when the justice of the case requires him to answer. But when, as in this case, the defendant claims no more than his principal and legal interest, to which, under the act of 1845, ch. 352, he is entitled, whether he has contracted for the payment of usurious interest or not, there would seem to be no motive for compelling him to answer, if he declines voluntarily to do so. *Cui bono*, force him to answer a charge which can have no influence upon the judgment of the court or the rights of the parties? It is also objected by the complainants that the defendant has not produced his accounts with *Baughman, Nicholson* and *Cannon*, for the last three years prior to the time of filing this bill, and stated the amount of excessive interest paid or supposed to have been paid by them to him within that period.

But the answer does give a statement of the only two transactions he has with those parties at this time, and I cannot see how the complainant can found an equity upon transactions past and settled. The legality or the illegality of former dealings between these parties, which have been settled between themselves, can have nothing to do with the merits of this particular transaction, and are not, therefore, proper subjects of inquiry. The fate of this controversy must depend upon the considerations which have been adverted to, and which affect it as an independent transaction, and it is to be determined without reference to anterior dealings with which it has no connection.

My opinion, therefore, is, that the equity upon which the injunction was granted, has been removed by the answer, and it must therefore be dissolved.”

The complainants appealed.

The cause was argued before DORSEY, C. J., MAGRUDER, MARTIN and FRICK, J.

By ADDISON and DULANEY for the appellants, and
By GLENN and PRATT for the appellee.

MAGRUDER, J., delivered the opinion of this court.

We agree with the chancellor that the injunction which the complainants had obtained in this case, ought not to be continued.

It is not to be denied that *George Baughman*, according to the statement in the bill of complaint, practiced a fraud upon the complainants; but we are not authorised to believe, that of such fraud the defendant, *Lee*, had notice at the time that the note of the complainants was received by him.

The note in controversy, we must take it for granted, was placed in the hands of the defendant *Lee*, as a security for the repayment of money borrowed at the time, of the latter, and without any reason to believe, that every cent of the money for which it was given, had not been received by the drawers. It was their own fault that it was in the power of the possessor of the note to make the improper use, which they say he did make, of it. The loss to be sustained, if any loss is to be sustained, the complainants themselves must bear, unless they can shew that the defendant *Lee* cannot claim the amount of it. Moreover, they must show some reason why they ask the aid of a court of equity; that they have a defence, of which, for some reason or other, they cannot avail themselves at law. This has not been shown.

The bill charges that the note in controversy was pledged to the defendant *Lee*, as a security for a debt claimed by him, and which it is charged was tainted with usury. Granting this to be the case, it surely cannot be insisted that, for this the complainants can avoid the contract. Before our act of Assembly 1845, chap. 352, if the debtor, or any person who had the right to represent him, asked in chancery to be relieved from the payment of any usurious debt, the principal and legal interest must be paid. The act of Assembly will not permit any person to avoid the contract, in any suit, whether in law or in equity. The principal and legal interest, are still due and to be paid, and the creditor is entitled to all the securities which he has, just as if by the original terms of the contract, it had been to pay the principal with legal interest.

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It is not necessary, then, for us to inquire, whether, as the case comes before us, we must take it for granted, that the transaction between *Lee* and his debtors, was one tainted with usury?

The act of 1845, has certainly made a great change in the law of usury. It is not for us to say, whether in this respect the law is improved, or to deprive the creditor of the benefit of that law.

But why should the defendant *Lee* be required, before he claims of the complainants the amount of their note, to exhaust any remedy which he may have by reason of other securities placed in his hands for the money due to him? If he attempted to recover the amount due to him by a suit upon these other notes, surely these debtors might, with equal propriety insist, that he should first seek to recover the amount due from the complainants on their note. Surely in this suggestion we can find no ground for a continuance of this injunction, and with any other subject we are not now required to meddle. Case to be remanded.

ORDER AFFIRMED WITH COSTS.

DAVID A. HALL, ASSIGNEE OF JOHN HOOVER, vs. THOMAS SEWELL.—*June* 1850.

Though the provisions of the bankrupt law of this country are different from the bankrupt law of *England*, yet here, equally strict proof of the assignee's title to sue is required.

The plaintiff, in proof of his title to sue in the courts of this State, as assignee of a bankrupt, and of his appointment as such assignee under the act of Congress of 1841, offered the proceedings of the circuit court of the *District of Columbia*, sitting in bankruptcy, upon the application of the bankrupt. **Held:** That the courts of *Maryland* have a right to examine into the validity of these proceedings, and to judge of the sufficiency of such appointment.

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The bankrupt law requires the assignee to give bond, and the same proof is required of his right to sue as assignee, as is required of a trustee of an insolvent debtor, appointed under our insolvent laws.

The appointment of the plaintiff as *general assignee* in bankruptcy, for the county of *Washington, D. C.*, is not such an appointment as is required by the act of Congress, to vest the property of the bankrupt in the plaintiff; and no proof being offered of his having given bond as special assignee, he cannot maintain this suit.

A judgment was obtained by the plaintiff upon default of the defendant to answer certain interrogatories filed by defendant, and a writ of inquiry ordered. Upon motion and affidavit of defendant's counsel, alleging surprise in obtaining this judgment, the court ordered it to be stricken out. **Held:** that the power of the court to strike out this interlocutory decree or judgment, is given by the act of 1787, ch. 9, sec. 6.

Where a plaintiff has filed a bill of particulars, he must confine himself to it in his proof, and he cannot propose interrogatories, the answers to which do not relate to the matters in issue.

APPEAL from *Baltimore* county court.

This was an action of *assumpsit* brought to September term 1846, of *Baltimore* county court, by the appellant, who is styled in the declaration, "assignee in bankruptcy of *John Hoover*, under a decree of the circuit court of the *District of Columbia*," to recover certain moneys alleged to be due by the appellee to said *Hoover*, at the time of his bankruptcy, and which passed to the plaintiff as his assignee. At the same term the defendant appeared and pleaded *non assumpsit*, and the plaintiff, on motion of the defendant, was ruled to give security for costs by the second Monday of January then next, and to file a bill of particulars. The plaintiff gave security as required, and on the 23rd of March 1847, during the January term 1847, a bill of particulars was furnished charging the defendant with \$50.000, in money, and proceeds of real and personal estate, received by him on the 12th of September 1842, from said *Hoover*, who conveyed the same to him in contemplation of bankruptcy, in order to conceal it from his creditors, the defendant not being a *bona fide* creditor of said *Hoover*. "

On the 30th of March 1847, also during the January term 1847, the plaintiff filed his petition, called in the record a bill of discovery, requiring the defendant to answer on oath the

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following interrogatories, which the court by its order of the same day, required him to do by the 30th of April then next.

1st. State whether on the day of *Hoover's* filing his petition in bankruptcy, in the district court of the *United States* for the *District of Columbia*, you were a *bona fide* and subsisting creditor of said *Hoover*? and if so, to what amount, and specify what securities or indemnities you held in any shape or form, and disclose the value of the same and what has been realized therefrom, directly or indirectly, since said securities came into your control or use.

2nd. Did *Hoover* previous to his bankruptcy, or petition in bankruptcy, execute to you his several notes, in all for the sum of \$35,000? and if so, state the date of said notes, the amount of each, and when each was payable, and further state how many of said notes, if any, were paid before his said petition, and especially state the actual and real consideration for said notes, and whether the same was *bona fide*.

3rd. Specify particularly each and every item of property, real, personal and mixed, which you have at any time since the 1st January 1842, held, possessed, controlled or claimed by gift, grant, sale, transfer or otherwise, from *Hoover*, with the value of the same, and the amount of proceeds if any part has been sold.

4th. State the amount of moneys, or valuable securities, at any time since the first of January 1840, placed in your hands, or control or custody by said *Hoover*, specifying as well as possible the date and amount of each deposit, transfer or arrangement, and for what real purposes as expressed and understood between you and said *Hoover*.

5th. State by what understanding, and under what real arrangement between you and said *Hoover*, each and every transaction referred to in the preceding interrogatories took place, and especially, what was the arrangement as to the right of said *Hoover* to draw moneys, or to sell or enjoy property placed by him in your possession, use or control, at any time as above stated in the foregoing interrogatories.

6th. State fully and particularly each and every draft drawn

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by said *Hoover* on you, and accepted or paid by you since the first day of September 1844, as well as since the date of his petition in bankruptcy, with the dates and amounts thereof. Also all sums of money paid or assumed by you, since said dates, for or on account of said *Hoover*.

7th. State whether you were not aware of the petition of said *Hoover* in bankruptcy, and if so, when you first heard of it, and also when you heard of his intention to petition under the bankrupt act?

The cause was then continued from term to term until January term 1848, when, the interrogatories remaining unanswered, a judgment by default was rendered for the plaintiff, with an order for a writ of inquiry. Afterwards, on the 26th of January 1848, during the same term, *Reverdy Johnson* and *John Glenn* the counsel for the defendant, filed their affidavits alleging surprise in the obtention of this judgment, and praying that it might be stricken out. On the 31st of the same month, *Robert J. Brent*, counsel for the plaintiff, filed a counter affidavit justifying the course adopted by him, and denying all design to take undue advantage. These affidavits show that the counsel misunderstood each other in reference to certain verbal agreements made by them in regard to the case. The court on the 7th of February 1848, ordered the judgment to be struck out, and to this order the plaintiff took his *first* exception.

On the 8th of February 1848, the court at the instance of defendant, gave him further time to show cause why he should not answer the plaintiff's interrogatories. Under this leave the defendant assigned the following reasons for not answering. 1st. Because the same were not filed by the trial term as required by the act of 1801, ch. 74, and the act of 1831, ch. 64. 2nd. Because the same are not a bill of discovery, and the court sustained these objections, and ordered the previous order directing the defendants to answer to be rescinded. To this the plaintiff took his *second* exception.

The cause was then tried, and the plaintiff offered in evidence two transcripts, from the records of the circuit court of the *District of Columbia*, sitting in bankruptcy, for the purpose of proving his

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appointment as assignee of *Hoover*, under the bankrupt law of Congress of the 19th of August 1841. The first of these transcripts set forth. 1st. The petition of *Hoover* for the benefit of the bankrupt law, with schedules of his creditors and property. The time of filing is not stated, though the affidavit to the petition was made on the 13th of April 1842. 2nd. An order of the court appointing, the 5th of September 1841, for the hearing of the petition, and directing notice to creditors, with a certificate of the printer, that the notice had been duly published. The date of this order is not given. 3rd. The transcript then states that on the said 5th of September, no creditors appearing, "the court passed the following decree, and appointed *David A. Hall, Esq.*, assignee of said *John Hoover*, a bankrupt, who gave bond with surety approved by the court." Then follows a decree declaring said *Hoover* a bankrupt, within the act of Congress of 1841, dated 5th of September 1842, and made absolute the 12th of the same month. 4th. A petition of *Hoover* for a certificate and discharge, stating that he has *bona fide* surrendered all his property for the benefit of his creditors, and on this petition an order of the court dated 12th of September 1842, appointing the 12th of December then next, for the hearing thereof, and directing notice thereof to creditors to be published, and the certificate of the printer, that said notice was duly published. 5th. A report signed by *D. A. Hall*, assignee of *John Hoover*, a bankrupt, stating that said *Hoover* had *bona fide* transferred to him all his property as required by the bankrupt law, upon which the court passed a decree for his discharge and certificate, dated 12th of December 1842, and made absolute on the 19th of the same month. 6th. A certificate of discharge, dated 19th of December 1842. 7th. A certificate of the clerk of said court, duly attested, certifying that the "aforegoing is a full, true and perfect transcript, of all the proceedings had in the said court, in the said cause of *John Hoover*, a bankrupt, as appears from the minutes of the proceedings of the said court."

The *second* transcript set forth. 1st. That *David A. Hall* is appointed general assignee in bankruptcy, "in and for Wash-

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ington county *District of Columbia*.” 2nd. The bond of said *Hall* as such general assignee, in the penalty of \$10,000, dated 22nd of February 1842, approved and recorded, 10th of March 1842. 3rd. A certificate dated 1st of October 1842, signed “*D. A. Hall* assignee of bankrupts,” certifying that *John Hoover*, a bankrupt, had transferred to him all his property as set forth in his schedule, attached to his petition for the benefit of the bankrupt act. 4th. A decree of said court, dated 19th of December 1842, granting a discharge and certificate to said *John Hoover*, the same as in the preceding transcript. 5th. The certificate of the clerk of said court duly attested, that the appointment of said *Hall*, “as assignee in bankruptcy, in and for the county of *Washington*, in the *District of Columbia*, his bond to the *United States* as such assignee, his certificate in the matter of *John Hoover*, and the certificate and discharge of said *John Hoover*, are truly and correctly copied from the minutes of proceedings and records of the said court.”

The court (LE GRAND, J.) upon the defendant’s prayer, instructed the jury that the above evidence was not sufficient proof of the appointment of the plaintiff as assignee of said *Hoover*, and that he could not therefore maintain this action. The plaintiff took his *third* exception, and the verdict and judgment being against him, appealed to this court.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MAGRUDER, MARTIN and FRICK, J.

ROBERT J. BRENT and JOHN NELSON, for the appellant, insisted, that there was error, *first*, in striking out the judgment by default, and rescinding the order requiring answers to the interrogatories; and *second*, in collaterally impeaching and annulling the appointment of the plaintiff, by the circuit court as general assignee in bankruptcy, and in holding that there was no evidence of his appointment as assignee of *Hoover*. On the latter point they cited:

Erwin vs. Lowry, 7 *Howard*, 172. *Shriver vs. Lynn*, 2 *Howard*, 58, *McCormick vs. Sullivant*, 10 *Wheat*. 199. *Ra-*

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borg vs. Hammond, 2 H. & G., 42. *Bowie vs. Jones*, 1 Gill, 214. 3 G. & J., 189. 8 G. & J., 346. 12 G. & J., 177.

GLENN and R. JOHNSON for the appellee, contended:

1st. That the interrogatories of the plaintiff constituted no such sufficient bill of discovery, as he had any lawful right to file, or to ask the defendant to answer.

2nd. That the said interrogatories, even if they constituted a proper bill of discovery, should have been filed by January term, 1847, and were in fact filed too late to avail.

3rd. That the court were right in striking out the judgment by default, both because of the facts stated in the affidavits and of the defects above alleged in reference to the said interrogatories; that they were also right, for the latter reasons, in rescinding the previous order to answer.

4th. That no appeal lies from the order of the court, striking out the judgment by default.

5th. That the two records, from the circuit court of *Washington*, do not separately, and cannot together, prove the proper and legal appointment of the plaintiff, as assignee of *Hoover*, or his having given bond, in such manner as to entitle him to sue as such assignee.

MAGRUDER, J., delivered the opinion of this court.

The point which arises in this case upon the last bill of exceptions, will first be disposed of.

The appellant, as the assignee of one *John Hoover*, a bankrupt, instituted this action in his own name, against the appellee, claiming sums of money alleged to be due from the appellee to the bankrupt, at the time of his application. Proof was offered of the claim, and of the proceedings, in the case of the bankrupt, and upon the evidence offered, the court at the instance of the appellee, instructed the jury, that it is not sufficient evidence of the appointment of the plaintiff, (appellant,) as assignee of *John Hoover*, and therefore the plaintiff could not maintain the action. Did the court err in giving this instruction?

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We are told in *2nd Maddock's Chancery Practice*, that in *England*, all the chancellor's jurisdiction in bankruptcy is derived from the legislature, it is a statutory jurisdiction, and begins and ends in acts of Parliament. In *2nd Philips on Evidence*, p. 319, (*Cowen's edition*,) we learn what proof must be offered by the assignees of a bankrupt, if their title be not admitted. The provisions of our statute of bankruptcy, are very different from those of the bankrupt law in *England*. In this country, however, proof, equally strict, of his title to sue, is required.

The plaintiff below, in proof of his title to recover in his own name, money alleged to be due by the defendant below to the bankrupt, offered in proof the proceedings which took place in the circuit court of the *District of Columbia*, upon the application of the bankrupt. It is objected, that these proceedings do not authorise the suit. One answer given to this is, that it is not competent for a court of *Maryland*, "not invested with appellate powers," to revise or question, the correctness of the circuit court; that the proceedings show the appointment of a trustee by that court, and what was done by him and the court in consequence of said application; these proceedings it must be presumed here, are correct. This is sometimes true, but not when the court is exercising the power conferred by the bankrupt law. It is possible, indeed, that the courts of the different States, will differ in their interpretation of some of the provisions of this act of *Congress*, each being governed by its own interpretation of its bankrupt or insolvent laws.

The bankrupt law, like our insolvent law, requires the trustee to give bond, and it is presumed that the same proof will be required of an assignee of a bankrupt, suing as assignee, that is required here of the trustee of an insolvent, appointed by our own judicial tribunals. In the case of *Winchester, trustee, vs. The Union Bank*, 2 G. & J., 73, we are told what proof is required of a trustee of an insolvent applicant, claiming a right to sue in that character. He must give bond, and so the assignee of a bankrupt is required

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to give bond, with at least two sureties, in such sum as the court may deem proper; and this, and every other requisite of the act of Congress, must be complied with, before he can sue in that capacity.

It was attempted in this case to show, that the appellant did give bond, and for this purpose two, (not corresponding) copies of the proceedings of the circuit court, were offered in evidence. The one shows that, previously to this application, he had been appointed a general assignee in bankruptcy, and had given bond faithfully to discharge his duties as such. It is thought that this is not such an appointment, as divests out of the bankrupt his property, and vests it in the assignee "appointed from time to time by the proper court."

Of this opinion, indeed, the circuit court seems to have been, for one of the records shows, that the general assignee was also appointed the assignee of *Hoover*. The special assignee, however, does not appear ever to have given the bond which the act of Congress requires.

When the assignee thus appointed claims and would exercise the right of suing in our courts, they must judge, whether in any such character, he has a right to maintain an action in them.

But there are two other exceptions of which we will now dispose. An application, by petition, had been made to the county court, to require the defendant below to answer certain interrogatories then submitted, and on the 30th March, 1847, it was ordered that the defendant answer them, on or before the 30th of April then next. On the second Monday of January, 1840, a judgment, or decree is obtained, because the interrogatories are not answered, and thereupon, the record tells us, let a jury come to inquire what damages the plaintiff hath sustained. We will not stop to inquire whether this is the course authorised by the act of Assembly?

During the same term, the attorney for the defendant filed in court affidavits, and one was filed by the attorney for the plaintiff, and upon motion, the judgment spoken of, was, by

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order of the court, stricken out. Because of this an exception was taken by the plaintiff.

The power of the court to strike out this interlocutory decree or judgment, will be seen by a reference to the act of 1787, chap. 9, sec. 6. Upon the affidavits filed, in connection with this motion, we shall only remark, that they^{it} show the necessity, in all such cases, that counsel reduce their agreements to writing. It cannot be doubted that each of the gentlemen misunderstood the other, and hence the surprise. See upon the subject of striking out judgments, 2 *H. & G.*, 374 and 379. See, also, in *Palmer and Hamilton vs. Oliver*, 11 *G. & J.*, 137, some remarks pertinent to applications of this description: "Judgments at law," said the court, 2 *H. & G.*, 378, "are not lightly to be interfered with, and it must be a case infinitely stronger than the present, to induce this court to sanction the striking out a judgment of almost eight years standing."

In the case before us, the motion was to strike out an interlocutory judgment, and made too the very term that the judgment was entered. It is not usual to refuse such motions.

But the court also rescinded the order which had been passed, and thereby dispensed with an answer to the interrogatories which the defendant below had been required to answer. Of this can the appellant complain in this court? The plaintiff had been required to furnish, and had furnished, a bill of particulars. To this he must confine himself in his proof, and cannot propose questions, the answers to which do not relate to the matters in issue. It is thought that this last order of the court, furnishes the plaintiff with no ground for reversing the judgment.

JUDGMENT AFFIRMED, WITH COSTS.

Clements vs. Smith's Adm'rs.—1850.

JOSIAS CLEMENTS vs. CATHARINE SMITH AND FRANCIS B. BURGESS, ADM'RS OF FRANCIS SMITH.—June 1850.

The right of a party who had purchased a slave, warranted by the vendor to be sound, but who proved to be unsound, to rescind the contract does not depend upon the fact that he returned or offered to return the negro within a reasonable time after the sale, but whether he did so within a reasonable time after he discovered the alleged fraud.

Where the defendants had offered evidence to show that the negro was unsound before the sale, it is admissible for the plaintiff to rebut this, by evidence going to show that he was sound at a particular time before the sale.

Where the appellant is not injured by an instruction, it is no ground for the reversal of the judgment, though it may have been erroneously granted.

The party defrauded has the option of acquiescing in the agreement or of avoiding it, but if he elect the latter, he is bound to manifest his determination within a reasonable time after discovery of the fraud.

A prayer which might mislead the jury is properly rejected, though, as an abstract question of law, it may be correct.

APPEAL from *Charles* county court.

This was an action of *debt* brought by the appellant against the appellees, administrators of *Francis H. Smith*, upon the following single bill :

“Six months after date, for value received, we, or either of us, promise and oblige ourselves, our, and each of our heirs, executors and administrators, to pay to *Josias Clements* or order, the sum of three hundred dollars.—Witness my hand and seal, this 25th day of August, 1845.—The erasures first made,

his

FRANCIS M SMITH,
mark.

E. N. STONESTREET.”

“Test.—*Wm. Matthews.*”

The defendants pleaded :—1st. Payment by the intestate in his life time. 2nd. That said single bill was obtained from said intestate by fraud, covin and misrepresentation, that is to say by the said plaintiff falsely and fraudulently representing to said intestate, that a negro slave which plaintiff had then sold to intestate, was then and there sound and healthy; and

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defendants say, that said single bill was executed in the confidence and faith that said representations were true, and made *bona fide*. Wherefore they say said single bill was and is void in law, and this they are ready to verify.

The plaintiff joined issue on the first plea, and traversed the second, upon which traverse the defendant took issue.

1ST EXCEPTION. At the trial the plaintiff offered in evidence the single bill, and then rested. The defendants then proved that the said single bill was given for the purchase money of a negro boy named *John*, purchased by intestate at the day of the date of said bill, at public sale, at which one *Joseph Stone*, since deceased, was the auctioneer; that said boy was put up by the auctioneer at request of plaintiff, as the property of the latter, and in offering him for sale the auctioneer warranted him to be sound; the boy and plaintiff were both present, and the auctioneer could be distinctly heard at the time of making his declaration of warranty. The defendants further proved by another witness who saw the boy the day after he was purchased, and had frequently had the boy in his service since, that the boy has not the free use of his limbs, and can do no good service; that his stomach is swollen, and he is and was from the time of intestate's purchase of him, defective in body and mind, and not worth more than his victuals and clothes. By another witness who was at the sale, that intestate had stopped bidding for the boy, and a higher bid had been offered, when the auctioneer asked intestate why he had stopped, who replied, he did not know if the boy was sound, and asked the auctioneer whether he was sound? to which the latter replied he supposed he was, but he would soon hear; that the auctioneer then stepped aside and spoke to some one, and presently returned saying that the boy was sound, and that he warranted him sound as a dollar; intestate then resumed bidding, and the boy was struck off to him. By another witness, that the boy is and has been, ever since his purchase, very infirm and of weak intellect, that he seems to be deformed, and cannot walk well; that no defect is discernible in the boy

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when sitting or standing still, but is perceptible when he moves; witness thinks, from his knowledge of him, the boy would be a tax upon any one who owned him; he is more defective in body than in mind. By another witness, that plaintiff before the sale had offered the boy to witness's brother, who told plaintiff he would not buy him, that he was very defective both from whipping and deformity, that in witness's opinion the boy was worthless, and a tax upon any one who owned him; that when the boy is in his clothes, he looks tolerably well, and that the defects are shown upon examining him. They also proved that the value of a boy of his age, (about seventeen years,) varied from \$300 to \$400. Upon this testimony plaintiff prayed the instruction, that plaintiff was entitled to recover, unless defendants further proved that within a reasonable time after said sale, their intestate either returned, or offered to return the negro to the plaintiff; which the court (CRAIN, A. J.,) refused to give, and plaintiff excepted.

2ND. EXCEPTION. The plaintiff for the purpose of rebutting the testimony offered by defendants, proved by a competent witness that he raised said negro, and sold him in December, 1844; and then offered to prove by said witness, that at that time the boy was sound; but the defendants objected to this evidence of soundness or unsoundness of the boy in December 1844, which objection the court sustained, and plaintiff excepted.

3RD EXCEPTION. Plaintiff then prayed the court: 1st. To reject the whole of the foregoing testimony, under the pleadings in the case, but the court refused, and admitted *the testimony to go to the jury*. Under the second plea of defendants, upon the whole testimony, the plaintiff prayed the following instructions: 2nd. That if *Smith* knew immediately after said purchase, that the boy was unsound, the plaintiff is entitled to a verdict, unless the jury find that in a reasonable time after he knew of said unsoundness, he offered to return said boy to the plaintiff. 3rd. That if they find that *Smith* was induced to buy the boy by reason of plaintiff's warranting him sound,

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and said boy proved to be unsound, and they also find that said warranty of soundness was the only inducement held out by the plaintiff to *Smith* to induce him to purchase the boy, then plaintiff is entitled to a verdict. 4th. That if they find that plaintiff did warrant the boy to be sound, and that he proved to be unsound, then plaintiff is entitled to a verdict, unless they find said plaintiff knew of said unsoundness, and fraudulently concealed the fact from said *Smith*. All of which the court refused to grant, and the plaintiff excepted.

4TH EXCEPTION. Upon the whole evidence the defendants prayed the instruction, that if the jury find that the note was given for the purchase money of the boy in question, and that at the time of sale the said negro was warranted by the plaintiff, or his agent, to be sound, and that *Smith* was induced to purchase the boy upon such representation; and that at the time of said sale the boy was in part unsound, then under the pleadings and evidence, the plaintiff is not entitled to recover; which the court gave, and plaintiff excepted, and the verdict and judgment being against him, he appealed.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MAGRUDER, MARTIN and FRICK, J.

By DANIEL M. THOMAS and McLEAN, for the appellants, and

By CAUSIN for the appellees.

SPENCE, J., delivered the opinion of this court.

In this case the court correctly rejected the plaintiff's first prayer. The defendants' right to rescind the contract, did not depend upon the fact that he returned, or offered to return the negro, within a reasonable time after the sale; but whether he did so, within a reasonable time, after he discovered the alleged fraud.

The court erred in rejecting the plaintiff's evidence in the second exception. The defendants had offered evidence to prove, that the negro man was sound before the sale, and without limitation of time, as to how long before the sale; and *Carter's* testimony was admissible to rebut that evidence.

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The first prayer in the third bill of exceptions, asked the court to reject the whole of the evidence, as inadmissible under the pleadings in the case, which the court refused.

This evidence had been given to the jury, and was admissible upon the issues, and conceding that unless it had been followed up by other and further testimony, its legal insufficiency to prove the issue, for which it was offered, (which we by no means intend to decide,) yet inasmuch as the plaintiff was not prejudiced thereby, the decision of the court does not furnish a ground for reversal.

The court erred in not granting the second prayer of the plaintiff, in the third bill of exceptions; this prayer presented the law of the case correctly.

Mr. Story in his *Treatise on Sales*, sec. 159, states the law thus; "Ordinarily, therefore, and in all cases of sale, the party defrauding is bound by his agreement, if the party defrauded choose to hold him to it. The party defrauded has the option of acquiescing in the agreement, or of avoiding it; but if he elect the latter alternative, he is bound to manifest his determination within a reasonable time after the discovery of the fraud. But if after he discovers the fraud, he remain silent, under circumstances in which silence would indicate acquiescence; or if he act or deal in relation to the subject matter in such a mode as to imply a willingness to stand by his bargain, he is considered as ratifying it, and he cannot afterwards avoid it. If he would avail himself of the fraud to avoid the contract, he must exercise his right of rescission immediately upon the discovery of the fraud; for if after knowledge thereof, he deals with the subject matter of the contract as his own, he cannot repudiate the contract, although he should afterwards discover further circumstances connected with the same fraud."

The court were correct in rejecting the plaintiff's third prayer in the third bill of exceptions. The hypothesis of this prayer was imperfect, and did not present the question of fraud which was in issue in the case, and although as an abstract question of law it might be correct, yet as in this case it might have misled the jury, the court properly rejected it.

Edelen vs. Middleton.—1850.

The court erred in refusing the fourth prayer in the third bill of exceptions, and granting the defendant's prayer in the fourth bill of exceptions, for the reasons assigned for reversing their judgment, on the plaintiff's second prayer, in the third bill of exceptions.

JUDGMENT REVERSED AND PROCEDENDO.

EUGENIUS F. EDELEN, SURVIVING HUSBAND OF ELIZABETH A. EDELEN, vs. ALEX. MIDDLETON.—*December 1850.*

A testator bequeathed certain negroes to his son, "to be paid to him after the natural life of my wife, *Eleanor*, and myself, at which death may last happen. But in case my said son shall die *without lawful issue, and before he possesses said negroes*, in case thereof, my will and desire is, that the whole of them shall go to my daughter," and in case his "daughter should die as aforesaid," then to his second daughter, and so down to the youngest child. The son died without issue in the lifetime of the testator. **HELD:** That the limitation over to the daughter, is good as an executory devise.

The fact that the thing devised is personal property, does not, *per se*, make a general failure of issue, after which it is limited over, mean a definite failure of issue.

A different rule prevails in the interpretation of the same words as to limitations over after a failure of issue, in a will disposing of realty, and a will disposing of personalty, but such a discrimination is never made where there is no expression or circumstance in the will which the court can lay hold of as evidence of some intention in the testator, that it should be a definite failure of issue.

The cases of *Dallam vs. Dallam*, 7 H. & J., 240. *Newton vs. Griffith*, 1 H. & G., 111, and *Briscoe vs. Briscoe*, 6 G. & J., 232, as to this point, examined and explained.

In this case, the words "and before he possesses said negroes," are so connected with the proceeding, as to show that the testator meant a definite failure of issue, a dying without issue before the right to possess the property devised should accrue.

The widow of the testator possessed a life estate in the negroes, and the remaining interest after the death of the son without issue, passed to the daughter.

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ter as a vested remainder, and upon her death, leaving issue then living, such vested remainder, became the property of her surviving husband; the surviving husband of the deceased child and only issue of the daughter, has no claim whatever to the property.

The words, "failure of issue," were not designed to give to such issue any interest in the property bequeathed, but were merely used as descriptive of the event, upon the happening of which, the otherwise absolute title of the legatee was to be defeated.

The rule that a devise of land without words of perpetuity or inheritance, with a limitation over on a dying without issue, enlarges the estate of the devisee from a life estate to an estate tail, has no application to such bequests of personal property.

In bequests of personal estate without words of perpetuity, the legatee does not take a mere life estate which can be enlarged by subsequent limitation, but an absolute estate which is incapable of enlargement.

The reason why such a limitation over of land is equivalent to an express devise, is, because if there should be issue at the death of the devisee, the limitation over could not take effect until such issue became extinct, and if the issue were not in such a case to take, there is nobody who could take under the will.

APPEAL from *Charles* county court.

This was an action of *trover* brought by *Eugenius F. Edelen*, (the appellant,) against *Alexander Middleton*, (the appellee,) to recover in right of his deceased wife, a negro woman, *Poll*, and her increase, and *Gusty*, mentioned in the clause of the will of *John B. Thompson*, executed in 1808, and admitted to probate 1815, recited in the opinion of this court by his honor, C. J. DORSEY.

Mary Ann Thompson, mentioned in this clause, married the appellee, and died prior to the death of the testator's widow, *Eleanor Thompson*, leaving issue, a daughter, the deceased, wife of the appellant. *Ignatius F. Thompson*, named in said clause, died without issue in the lifetime of the testator.

The pleas were, *non cul* and limitations. The only question decided in this case, arise upon the rejection by the court, (CRAIN, A. J.,) of the two following prayers offered by the plaintiff below, in which, and in the opinion of this court, all the facts of the case are stated.

1st. That by the true construction of the will of *J. B.*

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Thompson, the negro *Poll* and her increase, became the property of the issue of *Mary A. Middleton*, provided the jury find the deaths of *Ignatius F. Thompson* and *Mary A. Middleton*, in the lifetime of *Eleanor Thompson*, the widow of testator, and before either of them possessed said property, and that *Ignatius F. Thompson* died without issue.

2nd. That by the true construction of the will of *John B. Thompson*, the issue of *Mary Ann Thompson*, named in said will, who was living at her death, became entitled to the negro woman *Poll*, and her increase, after the death of *Eleanor Thompson*, provided the jury find that *Ignatius F. Thompson*, named in said will, died before the testator, without issue; and that *Mary Ann Thompson* died before *Eleanor Thompson*, without having possessed *Poll* and her increase.

The verdict and judgment were for defendant, and plaintiff appealed.

The cause was argued before DORSEY, C. J., MAGRUDER and FRICK, J.

By R. T. MERRICK and ROBT. J. BRENT, for the appellant, who contended:

1st. That limitation over in said clause, is good as an executory devise, and not too remote, the “dying without lawful issue,” being brought within the rule of law by the second contingency, viz: the life of the life-tenant.

2nd. That the limitation over to *Elizabeth Thompson*, third legatee mentioned in the will, being defeated by the birth of issue, was defeated in favor of the issue; and it was the true intention of the testator, that if any of the legatees survived himself and wife, *then* that legatee was to take, possess and enjoy the property bequeathed; and if any of the legatees in the order named, had “lawful issue,” and died prior to himself or wife, then that issue was to take, possess and enjoy the property, notwithstanding the survivorship of subsequently named legatees.

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CAUSEIN, for the appellee, insisted that the prayers were properly rejected:

1st. Because under no construction warranted by the law, could the wife of the plaintiff below claim title, except through her mother, the legatee, under the will of *John B. Thompson*—the estate bequeathed giving no separate interest to the issue of *Mary Ann Thompson*, (mother of the plaintiff's wife,) by way of remainder—the word issue, being used in the will as simply denoting the contingency, upon the happening of which, the estate in the property bequeathed, was to vest in *Elizabeth Thompson*.

2nd. That the estate thus vesting an interest in *M. A Thompson*, wife of appellee, during coverture, enured to his benefit, and it was his right to reduce it into possession, by taking the property in his own charge.

DORSEY, C. J., delivered the opinion of this court.

But two questions have been argued and submitted for decision in the case now before this court. The first of which is, whether, the limitation over to *Mary Ann Thompson*, in the will of *John B. Thompson*, is a good executory devise. The clause in the will, under which the present controversy arises, is in these words; "I give and bequeath unto my son, *Ignatius Fielder Thompson*, two negroes, the one called *Pol*, who is the wife of *Nace*, and the other her child called *Gusty*, as also, the said *Pol's* future increase, that she may have hereafter, to be paid to him after the natural life of my wife, *Eleanor* and myself, at which death may last happen. But in case my said son shall die without lawful issue, and before he possess the said negroes, in case thereof, my will and desire is that the whole of them shall go to my daughter, *Mary Ann Thompson*; in case she, my said daughter, should die as aforesaid, my will and desire is, that the property aforesaid, shall go to my second daughter *Elizabeth Thompson*, and so on, down to the youngest of my children; this being according to a particular contract made with my brother in law, *Ignatius Middleton*, at the time I swapt with him for said negro *Pol*."

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Ignatius Fielder Thompson, named in the foregoing clause, died without issue, in the lifetime of the testator. *Mary Ann Thompson* married *Alexander Middleton* the appellee, and died prior to the death of *Eleanor Thompson*, the widow of *John B. Thompson*, leaving one child, the deceased wife of the appellant. By an act of the General Assembly of this State, the death of *Ignatius Fielder Thompson*, did not cause the legacy to him to lapse, but it passed to his executor or administrator, in the same manner that it would have done had he survived the testator and then died. On the part of the appellant it is contended, that although the limitation over, be after a failure of issue generally, yet that, inasmuch as the thing bequeathed is personal property, such a failure of issue *per se* means a definite failure of issue; a dying without issue, living at the time of the death of the prior legatee. And for the establishment of this principle, numerous authorities were referred to, none of which it is believed, give any countenance to such a doctrine, except an *English* decision long since overruled, and a *dictum* to be found in a passage of this court's opinion, in *Dallam vs. Dallam*, 7 Har. and John., 240. It is true the learned judge, (who delivered the opinion of the majority of the court, in that case, relating only to a devise of land, and where there were other expressions in the will showing a definite failure of issue was meant,) does say: "and it is not like the case of a limitation over, on a dying without issue generally, which, however a plain man might understand it, is now, when applied to real estate, technically construed to mean an indefinite failure of issue; though the same rule does not extend to dispositions of personal property." But in the principle thus enunciated all that the court designed to say, was, that a different rule prevailed in the interpretation of the same words, as to limitations over, after a failure of issue in a will disposing of realty, and a will disposing of personalty. And in this distinction it was undeniably correct; the books being full of cases making such a discrimination. But such a discrimination is never made, where there is no expression or circumstance in the will, which the court can lay hold of as

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evincive of some intention in the testator, that it should be a definite failure of issue. That such was the meaning of the court, in the passage of their opinion, in *Dallam vs. Dallam*, is clear almost to demonstration, when we advert to its opinion, in *Newton vs. Griffith*, 1 *Har. and Gill*, 111; written by the same judge, and both cases being submitted to him to prepare the court's opinions, which were both prepared by him about the same time, before either was filed with the clerk of the court. It is impossible to read the courts opinion, in *Dallam vs. Dallam*, and that part of its opinion, in *Newton vs. Griffith*, in the 117, 118, 119 and 120 pages, without being convinced that the opinions, in the two cases, ought to be made to harmonize in the mode suggested.

The case of *Briscoe vs. Briscoe*, 6 *Gill and John.*, 232, has been relied on to prove that a limitation over of personal property, after a dying without issue, generally is good as an executory devise, and that the court will, in such a case, without any other words or circumstances in the will indicating such an intention of the testator, regard the limitation over as being after a definite failure of issue, that is, a failure of issue at the death of the first legatee. But this case is rather an authority for the converse of this proposition. It is there said, that "in order to support the limitation over, the courts, in such cases, generally incline to lay hold on any expression or circumstance in the will, which seems to afford a ground for such a construction." Now if a limitation over, after a failure of issue, generally, *per se*, imported a definite failure of issue, it is strange that courts should waste their time in searching for such expressions or circumstances to lay hold on them, that they might make such a construction when they were bound to have made it, whether such expression or circumstances were to be found in the will or not. But the case of *Hatton vs. Weems*, 12 *Gill and John.*, 83, is an express adjudication that such limitations over, are void, when unattended by such expressions or circumstances. That such is the law in *England*, is fully established by the following authorities; 1 *P. Wm's*. 663. *Fourth and Chapman*; 2 *Atk.*, 308. *Beauclerk*

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vs. Dormer; 3 *Atk.*, 287. *Sheffield vs. Ld. Orrey*; 2 *Vez., Jr.*, 535. 2 *Atk.*, 646. *Reud vs. Snell*, and *Fearn on Rem.*, 472. Our next inquiry is, are there in the will before us, any words or circumstance from which an inference can be drawn, that a definite failure of issue was intended by the testator? We think there are. The limitation over, is, if the "son shall die without lawful issue and before he possess" the said negroes. These latter words are so connected with the preceding, as to show that the testator meant a definite failure of issue, a dying without issue, before the right to possess the property devised should accrue. The possession of the first legatee, if it occurred at all, must take place upon the death of the testator and his wife, two lives in being, and it is apparent that the testator looked to a dying without issue, before the right to possession could arise. He must therefore be presumed to have intended, or, at least, in our efforts to give efficacy to his bequest, we are justified in presuming, that the limitation over, was only to take effect upon the death of the first legatee without issue then living. *Ignatius Fielder Thompson*, having died without issue living at the time of his death, and having never acquired the possession of the negroes, the limitation over to *Mary Ann Thompson*, is good as an executory devise. *Mary Ann Thompson*, having died leaving issue, but, in the life time of the widow of the testator, the second question in this cause presents itself, viz: in whom is the title to the property bequeathed? in the appellee as the surviving husband of *Mary Ann Thompson*, or, in the appellant, as the surviving husband of her daughter, her only issue? And upon this subject, although the rights of the appellant have been pressed upon the court with the greatest ingenuity and zeal, yet we feel not a momentary doubt in declaring, that the appellant has not the shadow of a claim to the property in controversy. The bequest of the negroes to *Ignatius Fielder Thompson*, passed to him as absolutely the title thereto, subject to a life estate in another, as could have been done by the addition of any words of perpetuity or otherwise. And upon his death without issue then living, the same title passed to *Mary Ann Thomp-*

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son. *Eleanor Thompson*, the widow of the testator, being in possession of the negroes, with a life estate only therein, the remaining interest in the negroes passed to *Mary Ann Thompson*, as a vested remainder; and upon her death leaving issue then living, such vested remainder became the property of her surviving husband, as would any other of her choses in action under the testamentary laws of *Maryland*. There were in the will no words of express or implied bequest to the issue of *Mary Ann Thompson*, or of limitation over to it, upon any contingency; and consequently it can have no standing in court, in the action before us. The words, "failure of issue," in the limitation over, were not inserted in the will of the testator, to indicate that he had given or designed to give to such issue, any interest in the property bequeathed; but were merely used as descriptive of the event or contingency, upon the happening of which, the otherwise absolute title of the legatee was to be defeated.

The cases which have been referred to on behalf of the appellant, where it was held, that a devise of land to a devisee, without any words of perpetuity or of inheritance, with a limitation over on a dying without issue, enlarges the estate of the devisee from an estate for life to an estate tail, have no application to such bequests of personal property; because, in the latter class of cases, by the first part of the bequest, the legatee does not take a mere life estate, which could be enlarged by the subsequent limitation, but takes an absolute estate in the property which is incapable of enlargement. The reason why such a limitation over in the former class of cases is equivalent to an express devise to the issue is, because if there should be issue at the death of the devisee, the limitation over could not take effect till such issue became extinct, and if the issue were not in such a case to take, there is nobody who could take under the will. But in such bequests of personal property upon the death of the legatee, his interest in the property immediately vests in his executor or administrator. This principle was in fact decided in *Forth vs. Chapman*, 1 P. Wms., 667, where the lord chancellor says: "That the reason why the devisee of

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a freehold to one for life, and if he die without issue then to another, is determined to be an estate tail, is in favor of the issue, that such may have it and the intent take place; but that there is the plainest difference betwixt a devise of a freehold, and a devise of a term for years, for in the devise of the latter to one, and if he die without issue then to another, the words if he die without issue cannot be supposed to have been inserted in favor of such issue, since they cannot by any construction have it.” Concurring in opinion with the county court, in its refusal to grant the first and second prayers of the appellant in his second bill of exceptions, its judgment is affirmed.

JUDGMENT AFFIRMED.

GEORGE RHODES AND JANE, HIS WIFE, AND DAVID YOUNG, AND PHOEBE, HIS WIFE, vs. JOHN T. VINSON AND HARRIET, HIS WIFE, AND ARMISTEAD T. HAGAN.—*Dec.* 1850.

The destruction of a will in the presence of the testator, or even by his own hands, will not amount to a revocation in law, unless he had at the time capacity to understand the nature and effect of the act, and performed it, or directed it to be performed, freely and voluntarily, with intent to effect a revocation.

Where the contents of a will improperly destroyed, are satisfactorily proved by witnesses, they will be established as the will, but the policy of the law, which throws around wills more protections than to any other mode of conveyance, requires such contents to be proved by the clearest, the most conclusive and satisfactory proof.

The proof of the *entire* contents must be conclusive and satisfactory.

APPEAL from the orphans court of *Montgomery* county.

This was a plenary proceeding, instituted by said orphans court upon the petition of the appellees, to set up a last will and testament, which the petition alleges was executed by a

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certain *Joshua Chilton*, the grandfather of the appellees, *Harriet* and *Armistead*, in his lifetime, when he was of sound and disposing mind, memory and understanding, and capable in law of making a valid deed or contract, and which he destroyed when he was not capable of revoking a last will and testament, he being at the time in charge of a committee as a lunatic.

The appellees attempted to prove the execution of said last will and testament according to law, to pass real and personal estate, when of sound and disposing mind, &c., and its destruction by said *Joshua Chilton*, when of unsound mind, &c., by several witnesses, whose depositions were written down and filed in the cause. Upon these depositions and papers filed, (the purport and effect of which are sufficiently stated in the opinion of this court,) the orphans court decreed in favor of the said will, and ordered the same to be recorded, as substantially proven by them, from which decree *George Rhodes* and *Jane*, his wife, a daughter of said *Chilton*, and *David Young* and *Phæbe*, his wife, also a daughter of said *Chilton*, appealed.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

By McLEAN for the appellants, and
By R. J. BOWIE for the appellees.

SPENCE, J., delivered the opinion of this court.

After a careful examination of the authorities, bearing upon the questions of law, presented for our adjudication in this case, we are satisfied that the court correctly announce the law, both upon principle and authority, in the case of *Idley vs. Bowen*, 11 *Wendell*, 235.

The doctrine in the case of *Idley vs. Bowen* is as follows: "The destruction of the instrument, by the direction and in the presence of the testator, or even by his own hand, will not amount to a revocation in judgment of law, unless he had at that time sufficient capacity to understand the nature and effect of the act, and performed it, or directed it to be performed free-

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ly and voluntarily, with the intent to effect a revocation; and although the instrument is not in being, its contents having been satisfactorily shown, there is no difficulty in establishing it as a will, if it is shown to have been improperly destroyed, *vide Trevelyan vs. Trevelyan*, where the same doctrine is held, 1 *Phillimore* 149.

We shall not stop to inquire as to proof of the capacity of the testator, at the time of the execution of the will, or of its legal attestation, but concede that both of these requisitions were legally gratified. We are first to inquire, whether the contents of the paper, which was destroyed are satisfactorily proved.

The policy of the law has thrown around last wills and testaments, as many, if not more, shields to protect them from frauds, imposition and undue influence, than any mode of conveyance known to the law.

Can there be a doubt, that in cases like the present where the object is to establish the contents of a paper which has been destroyed, as and for a last will, that policy does require the contents of such paper to be established by the clearest, the most conclusive and satisfactory proof? We think not.

We think this very case furnishes a clear illustration of the soundness of that policy, which requires that the proof of the entire contents should be conclusive and satisfactory; and the authorities on this question all hold this doctrine. Is such the proof in this case? There are some four or five witnesses, no two of whom agree as to the entire contents of the will, all or nearly all affirm their recollection to be indistinct and imperfect. This fact, coupled with the vagueness, uncertainty and discrepancy of the proof of the contents of the instrument, seems more to confuse than to convince the mind and satisfy the judgment what the contents of the will were. This court has no standard, or scale, by which they can measure and determine the weight of the testimony of the different witnesses, in order that any one of them should preponderate over all the rest; which would be indispensable, where they all conflict, in order to arrive at a satisfactory conclusion, as to what the contents of the instrument were.

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We forbear to express any opinion upon the question of capacity, at the time of the destruction of the paper, for the reason that it is one of fact, and would not change the decision in the case.

The decree of the orphans court is reversed with costs.

DECREE REVERSED WITH COSTS.

STATE, USE OF CHARLES B. CALVERT, ADM'R. D. B. N. OF
THOMAS CRAMPHIN, vs. RICHARD WILLIAMS.—*December* 1850.

Where arbitrators mistake the law, and by reason of this mistake, have given an award in favor of one of the parties, and this fact be shown by the award itself, the county court has the power and is bound to set aside such award.

Where the order of an orphans court revoking letters of administration, has been appealed from, the appeal suspends the order of revocation, and leaves the letters in full force and effect, pending the appeal.

The granting of letters of administration, is a revocation of letters of administration *pendente lite*.

Where objection is made to the grant of letters, and an appeal is taken from the order granting them, while that appeal is pending the letters cannot be granted.

APPEAL from *Montgomery* county court.

This was an action of *debt*, brought in the name of the State, upon a bond given by the appellee and his securities, as administrator *pendente lite* of *Thomas Cramphin's will*. The original writ was endorsed for the use of *George Culvert*, administrator of *Thomas Cramphin*.

After *nar* filed and the plea of general performance, the death of *George Calvert* was suggested, and the suit was ordered to be entered for the use of the appellant, as administra-

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tor *de bonis non* of *Thomas Cramphin*. A replication was then filed stating the appointment of defendant, as administrator *pendente lite*, and that the contest being ended, *George Calvert* was appointed administrator of *Thomas Cramphin*; that defendant collected sundry sums of money, and received large debts, and after the termination of the contest, the said administrator demanded of defendant all said sums, goods and chattels, which defendant refused to pay over and deliver to said *Calvert*.

The cause was then continued, and under leave to amend, the defendants filed several pleas, among others, that “*George Calvert* for whose use the writ was issued, was not at the impetration thereof the administrator of *Thomas Cramphin*.”

The cause was then by agreement of counsel referred to *L. A. Dawson* and *J. W. Anderson*, with power if they could not agree upon any question of law or fact, to submit the same to the final decision of the *Hon. Thomas B. Dorsey*, whose judgment shall be final and decisive. The agreement then proceeds to set out the matters referred, and concludes with the following proviso: “And provided that the liability of the defendant *Richard*, to the plaintiff *Charles*, administrator *de bonis non* of *Thomas Cramphin*, in this or any other form of action, is not admitted by this reference, but the same is open before the arbitrators, as fully as in a court of law.”

Upon this reference the arbitrators awarded, “that the plaintiff cannot maintain the present action, because *George Calvert* at whose instance and for whose use the same was brought, was not the administrator of *Thomas Cramphin*, competent to institute an action, as such, at the time of the impetration of the original writ in said case, his letters of administration on the personal estate of said *Cramphin*, having been before that day revoked, by an order of the orphans court, and an appeal from said order, to the Court of Appeals, being then pending and undetermined, and we do therefore award and determine that a *non pros.* be entered in said cause,” &c.

Judgment was entered on the award for the defendants. A motion was then made by the plaintiff to set aside the award,

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among other reasons, because the award is founded on a mistake in law, apparent on the face of the award. The court overruled the objections, and the plaintiff appealed.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

By KILGOUR and ALEXANDER, for the appellant, and
By R. J. BOWIE, for the appellees.

MAGRUDER, J., delivered the opinion of this court.

The judgment from which this appeal is taken, was obtained in *Montgomery* county court, in a suit instituted upon a bond given by the appellee as the administrator *pendente lite* of *Cramphin*.

The suit was originally brought in the name of the State, for the use of the administrator of *Cramphin*, and upon the death of the administrator, it was entered for the use of the administrator *de bonis non*.

If the plaintiff at the time of instituting the action had a good cause of action, the administrator *de bonis non*, was the person to whom, after the death of the administrator, the estate was to be delivered up, and the suit was then to be prosecuted for his use.

The defendant pleaded, with other pleas, of which no notice need now be taken, that at the time of the institution of the suit in that case, *George Calvert*, was not the administrator of *Cramphin*. No issue was joined, when by the agreement of the parties, the cause was referred to *Lawrence A. Dawson* and *James W. Anderson*; and the agreement to refer proceeds to state sundry matters which are to be adjusted by the arbitrators, and umpire, "if in their opinion the said *Richard Williams*, is legally responsible in this action for the same." To this agreement too, there is annexed a proviso, that the liability of the said defendant, (*Williams*,) to the plaintiff, *Charles*, administrator *de bonis non*, in this or any other form of action, is not admitted, but the same is open before the arbitrators, as fully as in a court of law.

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Without attempting to define the precise extent of the powers and duties of the arbitrators, it may be taken for granted, they were authorized to assess any damages of which the administrator *de bonis non*, properly complained in his replication. *Williams*, it seems, had been the administrator *pendente lite* of the estate of *Cramphin*; the controversy had been determined, the estate in the hands of the administrator *pendente lite*, had not been delivered up, although it had been demanded by the administrator, and for his use this suit upon the bond of the administrator *pendente lite*, was brought.

By the award, it appears, that the arbitrators did not attempt to adjust any of the claims referred to them, but leaving them unsettled, awarded in favor of the defendant, simply, because as the award itself states, *George Calvert* was not the administrator of *Thomas Cramphin*, competent to institute an action as such, at the time of the impetration of the original writ in this case. It is added, as the reason for this decision, “his letters of administration on the personal estate of the said *Cramphin*, having been before that day revoked, by the order of the orphan’s court, and an appeal from the said order, to the Court of Appeals, being then pending and undetermined.” We must collect from this, that the arbitrators were satisfied by the proof laid before them, that *George Calvert* had been appointed the administrator of *Cramphin*, before the institution of this suit; and that also before its institution, the orphans court had passed an order that they be revoked. Being convinced of these facts, the arbitrators decided the law to be, that this terminated the right of the administrator, or the right of the State for his use, to institute a suit upon the bond given by the administrator *pendente lite*, although an appeal had been taken by *Calvert* from that order, and at the time of the institution of the suit such an appeal was pending and undetermined.

If herein the arbitrators mistook the law, and because of this mistake have given an award in favor of the defendant, and this be shown by the award, the court below had the power and was bound to set aside the award.

The question then is, whether the letters of administration,

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were yet in force notwithstanding the order of the orphans court, there being an appeal from that order pending at the time the suit was instituted?

It is the opinion of this court, that the appeal suspended the order of revocation of the orphans court, and the letters of administration were left in full force and effect pending the appeal. The order of revocation certainly did not revive the letters of administration *pendente lite*. The grant of the letters to *Calvert*, revoked them, (7 *H. and J*, 40,) and if the administrator, notwithstanding the appeal, ceased to have authority to take charge of the estate, there was no person who could have such authority. There is no provision in our testamentary system, which countenances the idea that an order of an inferior court, such as this, has, until it is reversed, all the force and effect which it will have when it is affirmed by the court of last resort.

George Calvert, was the administrator, while the application for a revocation of the letters was pending in the orphans court, and while his appeal from the order of that court was pending, he continued to be administrator, possessing all the powers and bound to perform all the duties of an administrator.

If the party at whose instance the order was passed, instead of waiting until the letters were granted, had objected to the granting of them, and had appealed from the order granting them, then, while that appeal was pending, the letters could not have been granted; (*Offutt and Clagett vs. Gott*, 12 *G. & J.*, 385,) and for the like reason the letters in this case remained in full force until it is decided, upon the appeal, that the person to whom they were granted, is no longer to be the administrator.

We can discover no reason why the law, as laid down in the authority to which we have been referred, (4th *Sergeant and Rawle*, 202, and 8th *Smedes and Marshall*, 211,) should not be considered the law of this State.

Such would have been the law of the case, if the suit had been brought in the name of *Mr. Calvert*, but the suit is brought

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in the name of the State, for a breach of the condition of the bond given to the State. The damages when recovered would be for the use of the person who is aggrieved by the alleged breaches.

One and a material object of an immediate appeal is to prevent a revocation of the letters of administration, which had already been granted. If the appellant succeeds, the order from which he appealed is a nullity and can have no effect in the administration of the estate.

Judgment reversed, with costs, award set aside, and *procedendo* to issue.

JUDGMENT REVERSED AND PROCEDENDO.

**JAMES MALCOLM, PERMANENT TRUSTEE OF HENRY KEENE,
vs. WASHINGTON HALL, JR.—December 1850.**

An assignment by a debtor in failing circumstances, of all his property, without restriction, for the benefit of all his creditors, without favor or preference, is good at common law, and can only be questioned when it contravenes the express provisions of the insolvent laws.

If such assignments be executed with a view to give an undue and improper preference when the grantor had no reasonable expectation of being exempted from liability, for or on account of his debts, without applying for the benefit of the insolvent laws, then the law denounces them, and the trustee in insolvency afterwards appointed, may avoid them.

Mere proximity in point of time, between the date of the assignment and the application for the benefit of the insolvent laws, standing alone, without any supporting circumstances, is not to be received as adequate or reliable proof of what the insolvent intended or anticipated at the time of executing the assignment.

A denial in an answer upon oath, that the assignment was made with a view of an application for relief under the insolvent laws, though coming from the grantee and not the insolvent, is sufficient to put the complainant upon his proof.

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The policy of the insolvent laws rather favors than discountenances such assignments as are made for the equal and undiscriminating benefit of all the creditors.

APPEAL from the Court of Chancery.

This was a bill filed by the appellant, the trustee in insolvency of *Henry Keene*, to avoid an assignment made by the insolvent to the appellee, before his insolvency, as a fraud upon the insolvent laws.

The bill states, that on the 30th of April, 1847, *Keene*, assigned by deed of that date, all his property to the defendant in trust, to be distributed among his creditors. That at the time of making this assignment, *Keene* was insolvent and known to be so by the grantee, and that said conveyance was made in contemplation of insolvency. That on the 7th of May following, he applied for and obtained the benefit of the insolvent laws, and complainant was duly appointed his permanent trustee. That defendant has refused to deliver the property so conveyed to complainant, though requested so to do. The bill then prays for a decree setting aside this assignment as fraudulent, and requiring the property to be delivered to complainant.

The answer of *Hall*, the only defendant, denied that this assignment was made in contemplation of an application for the benefit of the insolvent laws, such application only having been made in consequence of a refusal of complainant as solicitor of one of his creditors, to dispense with special bail in an action against him. He also denied that the assignment was fraudulent and void, within the meaning of the insolvent laws, and states that immediately after the execution thereof, he had called upon the creditors of the insolvent to inform them of it, who assented thereto, and directed him to proceed in the execution of the trust reposed in him by it.

The deed of assignment filed with the bill recites, that, "at the time of executing these presents, the said *Keene* is indebted to divers individuals and firms, in sundry sums of money, which he is unable fully to satisfy and discharge, but is willing

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and desirous, so far as lies in his power, to make provisions for all just claims against him, and with that view has determined to execute this instrument." It then proceeds to convey all the property of the grantor of every description, to the grantee in trust, to sell the same and apply the proceeds, after deducting a commission of eight *per cent* and expenses attending the execution of the trust, "to or towards the payment, satisfaction or discharge of all just claims now existing against the said *Keene*, that is to say, ratably or proportionably, if the fund be insufficient to discharge the whole, or to the full payment of all just claims, if the fund be sufficient for the purpose."

A replication was filed to the answer, and the cause being then submitted, the Chancellor (*Johnson*,) passed a decree dismissing the bill, accompanying which, he delivered an opinion, which is reported in *1st Md. Chancery Decisions*, 172. The complainant appealed.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

By GWINN for the appellant, and

By BARTOL for the appellee.

FRICK, J., delivered the opinion of this court.

The case here presented by the complainant, does not entitle him to the relief he claims in a court of equity.

Apart from the insolvent laws of the State, it is not contended that the conveyance from *Keene* to *Hall*, could be successfully impeached. It purports to convey all his property of every description, and without any reservation, to the grantee in trust, for the benefit of *all* his creditors. And without any circumstances of fraud or *mala fides* attached to the transactions, the law rather favors than discourages such a proceeding on the part of an unfortunate debtor. If he surrenders all without any restrictions and conditions, and without favor or preference among his creditors, he has done all that an honest

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man can be required to do. He has done what the law would require of him, if the circumstances compelled him to ask for relief under the insolvent laws.

And if the trust created by him, is not designed to embarrass or hinder the lawful action of his creditors, but is a surrender of all he has for prompt and equal distribution among them, and under failing circumstances such as the recital of this deed indicates, we can see no ground to impeach the legality or fairness of the transaction.

On the contrary, assignments of this character have been uniformly declared good at common law, and have had the repeated sanction of this court. And they are only questionable when they contravene the express provisions of the insolvent laws.

If executed with "a view to give an undue and improper preference," when in the language of the act, "the grantor had no reasonable expectation of being exempted from liability or execution for, or on account of his debts, without applying for the benefit of the insolvent laws," then the law denounces, and a trustee afterwards appointed by the insolvent court, may avoid them.

But here there is nothing to sustain this assumption of fraud against the insolvent laws. The case is submitted upon the bill, answer and replication. The bill avers that the grantor owed debts beyond the amount of the property conveyed, and the assignment is alleged to have been "in contemplation of insolvency." If this means in view of an application for relief under the insolvent laws, or rather that he had no reasonable expectation of escaping such application, the answer denies it, and affirms that the conveyance was made for the express purpose of avoiding it, and that all the creditors subsequently assented. This denial upon oath, although from the grantee and not the insolvent, is at least sufficient to put the complainant upon his proof. And when he relies upon the proximity in point of time, between the date of the deed and the day of the application, as evidence to show the *animus* and reasonable expectation of the grantor, that single fact, standing alone with-

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out any supporting circumstances, is not to be received as adequate or reliable proof, of what the insolvent intended or anticipated at the time of executing the assignment. And taken with the explanation given in the answer, that the grantor was only afterwards coerced to apply to the insolvent commissioners, by the rigorous conduct of one of his creditors, it discloses no such motive or expectation as would bring this assignment within the provisions of the act. With a conveyance like this, fair upon its face, and just and equal in its provisions, it would require additional and corroborating evidence to justify legal conclusion that it was designed to contravene the provisions of the insolvent laws.

It has been strongly insisted that assignments of this character are against the policy of our insolvent system, and ought to be avoided on that ground. So far as we are at liberty to look to the intent of these laws, the governing policy would seem to favor rather than discountenance such assignments as are made for the equal and indiscriminating benefit of all the creditors. And from the successive and numerous amendments and supplements to the original act, it is manifest, that the legislature meant to leave nothing to construction or inference, in the interpretation of these assignments in favor of creditors. They are either within the terms of the act, or excluded from it; and the only inquiry when such an assignment is litigated, is, whether it is embraced in any of the provisions of the act, which in terms condemn and prohibit it? The conveyance before us, being free from all such objection, the decree of the chancellor is affirmed with costs.

DECREE AFFIRMED.

Bullock vs. Campbell.—1850.

URIAH J. BULLOCK vs. BERNARD M. CAMPBELL.—*December*
1850.

Where the endorser of a promissory note was sued by the holder, and had paid but *part* of the judgment recovered against him on the note, it was **Held**: That he could maintain an action of *assumpsit* against the maker for the part so paid, and that against such an action, the statute of limitations begins to run from the time the money was paid, and not from the maturity of the note.

It is now well settled, that in cases of principal and surety, the statute does not begin to run until the payment is made by the latter.

If the suit had been instituted upon the note, the endorser would have had to pay the whole note before he could sue for the money paid by him.

Where a security is obliged to make several payments, he may bring several suits for the amounts so paid, and the statute runs against each payment from the time it was made.

APPEAL from *Baltimore* county court.

This was an action of *assumpsit*, instituted by the appellant, the plaintiff below, against the appellee. The *nar* contained the common money counts. The pleas were *nonassumpsit* and limitations.

A verdict was taken by consent in favor of the plaintiff, subject to the opinion of the court on a case stated. By this statement, it appears that the plaintiff endorsed a note for the defendant, which matured 24th of July, 1840, for \$1462.45; which defendant passed to *Ogden Waddington & Co.* The note was unpaid at maturity, and was duly protested and notice given to all parties. The holders brought suit in a court in *Georgia*, against plaintiff, and recovered judgment in February, 1841. On this judgment a *fi. fa.* was issued, under which \$728.88 was made by sale of plaintiff's property on the 19th of February, 1844; and on the 24th of the same month, the plaintiff paid a further sum of \$274.12, and \$17.50 costs, but never paid the balance of said judgment. This suit was brought on the 11th of May, 1846, to recover of defendant the above sums of money paid by plaintiff on said judgment.

It was agreed by counsel, that if the opinion of the court on

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the above statement should be in favor of plaintiff, the verdict was to stand, and judgment be entered thereon accordingly, in favor of the plaintiff, but if their opinion should be in favor of the defendant, then the verdict to be set aside, and verdict and judgment entered for defendant.

The court being of opinion that the plaintiff was not entitled to recover, set aside the verdict, and rendered judgment for the defendant, from which the plaintiff appealed.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

By WM. SCHLEY, for the appellant, and
By DULANEY, for the appellee.

MAGRUDER, J., delivered the opinion of this court.

This appeal comes from *Baltimore* county court. The plaintiff below, (who is the plaintiff here,) instituted this suit 18th May, 1846, to recover so much money paid for, and at the instance of the defendant. This money was paid by the plaintiff to the holder of a promissory note, drawn by the defendant, payable to the plaintiff, and by him endorsed. Upon this note the holder instituted a suit against the plaintiff, recovered a judgment, which the plaintiff here paid *in part*, and for the amount paid by him, this action was instituted. It was instituted more than three years after the note became due, but less than three years after the payment was made.

If the plaintiff has a good cause of action, the plea of limitations is no bar to it, unless the time is to be computed from the day the money was to have been paid. But the statute does not begin to run in the case of principal and surety, until the time when the payment is made by the latter. This, if ever it could have been questioned, is now settled law. See *Gillespie vs. Creswell*, 12 *Gill and John.*, 36.

The plaintiff had no cause of action, until he was compelled to pay the money, and until he has a right to sue, limitations cannot begin to run.

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But the plaintiff paid only a part of the money due on the note, and it is insisted that he must pay the whole of it before he can sue for the money paid by him. This would be true, if the suit was instituted upon the note itself. But why not be permitted to sue for and recover, that which he has been obliged to pay? Very much of evil might arise to securities, if the law required them to pay the whole amount of the note in order to recover that which they have paid for the use of the principal. It is said that it gives to securities a right to make several causes of action of but one. If this be a fatal objection to the recovery, then when there are two securities, and each pays a part, it would seem that neither could recover. But whose fault is it that the balance is not paid? It is the fault of the appellee, and surely it can be no defence for him in an action brought to recover from him what has actually been paid for him, that he, himself, has not paid any part, although he was bound to pay the whole. That several suits may be brought in a case of this description, if the security is obliged to make several payments, was decided in *Pownal vs. Ferrand*, 13 *Eng. Com. Law Reports*, 230.

This decision does not allow a creditor to make several claims of one. The note is not the plaintiff's cause of action. He instituted this suit for all that he could claim when it was brought, and if afterwards he is obliged to pay another sum of money, because of a failure by the defendant to pay the debt, he will then have another distinct cause of action to which the plea of limitations will be no bar, until three years after such last payment, although it would be a bar to a recovery of the earlier payments, if they were made more than three years before the security sued for the amount of them.

As a further objection to the plaintiff's recovery it is urged, that he cannot maintain an action upon the implied *assumpsit*, because the note contains an express promise to pay, and there was a consideration for it. But the circumstances show not only the absence of all consideration, as a contract between the plaintiff and defendant, but also, that by the express understanding of all the parties to the note, although *in form*, it was

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payable to the plaintiff, yet he was not to receive one cent of the money mentioned in it. It was made payable to him, not because he was the person to whom it was due, but in order that the plaintiff, by endorsing it, might be liable as endorser in case the defendant failed to pay it to the only real payee. It is a note which the defendant was bound to pay, but was not at liberty to pay to the person named in it as payee. The plaintiff by endorsing it, has been obliged to pay money which was due from the defendant, which the latter was bound to pay, as it was his debt; and he has now no right to say that he ought not to be compelled to refund until the plaintiff has paid more money, due only from the defendant.

Upon neither of the grounds which have been relied on, can this judgment be affirmed.

Judgment reversed with costs, and upon the statement of facts, judgment for the plaintiff according to the agreement.

JUDGMENT REVERSED.

REBECCA WOOLLEN AND WILLIAM ROGERS, EXC'RS OF
ZACHARIAH WOOLLEN AND MARY KURTZ, vs. SOLOMON
HILLEN, EXC'R OF THOMAS HILLEN.—*December 1850.*

There are many decisions both at law and in equity, which decide that receipts in deeds are only *prima facie* evidence of payment, and that parol evidence is admissible to contradict such receipts, but where fraud is out of the question, there is no decision which goes so far as to decide that parol evidence is admissible, to vary, contradict and render utterly void a solemn deed.

A release, of a mortgage recited that the mortgagor had fully paid and satisfied the debt to the mortgagees. On the same day the mortgagor executed a new mortgage to one of the same mortgagees. HELD: That this release could not be explained by parol proof, and that by it the mortgagee lost his lien under the first mortgage, and the second mortgage must

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be postponed to those prior to it in date, though junior to the first mortgage.

It is well settled, that where there are two mortgagees under separate and distinct mortgages from the same mortgagor, and the prior mortgagee has a lien on two distinct funds, and the second on one of them only, equity will, for the protection of the subsequent incumbrancer, compel the prior incumbrancer to resort to that fund on which the second has no lien.

But this rule does not apply to a case where the prior mortgagee has a lien on two distinct estates of two separate and distinct mortgagors, and the subsequent mortgagee holds a lien on one only of these estates, encumbered by the prior mortgage.

APPEAL from the equity side of *Baltimore* county court.

This appeal was taken by the appellants from two orders of the court below, the one, of the 2d of March, 1849, directing the auditor of that court to state an account, allowing priority to a mortgage held by the testator of the appellee, in the distribution of the funds arising from the sale of certain mortgaged real estate, sold under a decree obtained upon a bill filed by the executor of *Woollen*, one of the appellants; the other dated 29th of March, 1849, ratifying the account, stated in conformity with the preceding order.

The facts of the case are fully stated in the opinion of this court, and in the following opinion of the county court, delivered by *Le Grand, J.*, accompanying the first of the above orders.

“The facts of this case are as follows: on the 27th *July*, 1826, *Tschudy*, executed a mortgage to the defendants, *Thomas Hillen* and one *Brice*, as therein stated, to secure the payment of certain sums of money. This mortgage only covered a portion of the land belonging to *Tschudy*, in *Baltimore* county. On the 2nd *June*, 1827, he executed another mortgage to *Mary Kurtz*, to secure the payment of \$1000. This mortgage included not only the whole ninety acres lying in *Baltimore* county, but also, certain lots of ground belonging to the wife of *Tschudy*, lying within the limits of the city; on the 2nd *June*, 1827, a similar mortgage was executed to *House, Woollen & Co.*, on the same property. On the 20th of *August*, 1829, *Hillen & Brice* released their mortgage, which had

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been executed, on the *27th July*, 1826, and on the same day *Hillen* took another mortgage on the same property, to secure the payment of the sum of \$3000, being the same sum which the mortgage of 1826 was designed to secure the payment of to him. In 1830 the mortgagees, *Kurtz*, and *Woollen*, and others, released the town lots embraced in their mortgages. The fund which is now in court for distribution, has been brought here as the proceeds of sale made under a decree, passed in this case, which originated in a bill filed by the executors of *Woollen*. Under this state of facts, the question is, which of the mortgagees are entitled, first to be paid out of the fund arising from the sale of that portion of the land lying in *Baltimore* county, covered by the mortgage to *Hillen*? To enable the court to understand the matter, the testimony of *Mr. McCulloh*, the gentleman who drafted the release from *Hillen* and *Brice*, and the mortgage to *Hillen* in 1829, has been taken, and read, subject to all legal exception. He states that the inducements and considerations for the execution of the release, and of the mortgage, were to free the lands, &c., therein described, from the lien given thereon, by the mortgage to *Hillen* and *Brice*, to the heirs of *Nicholas Carroll*, and to give to *Thomas Hillen*, as was done simultaneously by the execution of the mortgage of 1829, (expressly under the act of 1826, chapter 192,) power to enforce the punctual payment, semi-annually, of interest, &c., and that the principal sum of \$3000, mentioned in the original mortgage, was not paid at the time of the execution of the release by *Hillen*. There have been several questions discussed by the counsel, which, in the view taken by the court, it is unnecessary to decide. It may not however be out of place to say, that none of those urged on behalf of *Hillen*, accord with the opinions of the court, except the one on which this case must be decided, and that is the equity of *Hillen*, growing out of the original mortgage, which was released in 1829.

The first object of courts is to do justice, and this, when it can be accomplished in conformity with the rules which have been prescribed for their government, is an indispensable duty. Now what is the real state of this case? It is this: *Kurtz* and

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Woollen, with full knowledge of the existence of the mortgage to *Hillen* and *Brice*, take the mortgages to them, embracing not only the land included in that mortgage, but also additional land in the county, and certain lots in *Baltimore* city, clearly shew they took subject to the prior legal estate of *Hillen*, and subordinate to the equities it created. Had there never been any release executed by *Hillen*, there could have been no doubt of his priority. The question then is, does that release change the aspect of the affair? I think not. The case in, *5 Rawle*, 51, does not, in my judgment, touch the real question here involved. It was there decided, that as between creditor and debtor, it was competent for the holder of a judgment binding real estate, to discharge by covenant or release a portion of the estate from the lien, preserving it in force against the rest, and that this lien on the residue would not be destroyed, because of the release, if the holder of the judgment had not knowledge of a subsequent mortgage, and that he was not bound to know of the existence of subsequent incumbrances. This may be all true, and yet does not meet the facts in this case. The question here is, has the equity growing out of a prior incumbrance been discharged? To answer this question reference must be had, not to a portion only, but to all the facts. The mortgagees, *Kurtz* and *Woollen*, knew of the mortgage of 1826, and took subsequently, and of course subject to it. The release of that mortgage and the execution of the one bearing date in 1829, were simultaneous acts. They were placed on the records of the county at the same time, and were also executed at the same time. This being so they must be regarded as part of the same transaction. *Kurtz* and *Woollen*, could by the release acquire, in the absence of fraud or injury, no right, other than those which *Tschudy* acquired. There cannot be a question as between him and *Hillen*, that he took subject to all the equities growing out of the simultaneous execution of the release and new mortgage. In such a case no court of equity would allow of dower in such an estate as against the mortgagee. If this be so, and the decisions of our Court of Appeals, in my apprehension, go to this extent, how is

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it that those mortgagees who advanced their money, with a full knowledge that there was a prior incumbrance, can be in any other position than that of *Tschudy* himself? They could get nothing except through him, and if he was not by these simultaneous transactions vested with the legal estate to the prejudice of *Hillen*, they cannot be, unless the acts of *Hillen* have been such as to work a fraud, or do them an injury. There is no pretence of fraud, and all the injury which has been, or can be to *Kurtz* and *Woollen*, grows out of their partial releases. It is said they were not bound to ascertain the existence of the second mortgage.

This might be so if this mortgage stood alone, and the case in 5 *Rawle* doubtless goes to this extent. But the facts of the case show it did not. There is no affirmative evidence that they had no knowledge of the second mortgage, or the inducements and considerations which moved to the execution of the release and mortgage. In the absence of any such proof, it is not unreasonable to suppose, that before the execution of the partial releases by *Kurtz* and *Woollen*, they had the records examined. There is certainly sufficient evidence to authorize such a finding by a jury, on issues submitting such a question, and if such examination took place, then there was such notice to them as will subject them to all the equities growing out of the simultaneous execution of the release by *Hillen*, and the execution of the mortgage to him. The acts of *Hillen*, at the time they were done, did no injury to the other incumbrancers, whilst their acts, if the views of their counsel be adopted, worked, practically, a total destruction of the lien of *Hillen*. No court of equity will deprive a man of his lien, in favor of another holding a lien of no higher dignity, unless compelled to do so by the circumstances of the particular case. In this case the mortgagees, *Kurtz* and *Woollen*, get what they contracted for. Any loss they may sustain is to be attributed entirely to their own acts. Had they retained the security which was given them when they advanced their money, they would now be fully protected. Equity requires they should suffer the consequences of their own indiscretion. This case being before

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the court, by consent of counsel, with the view that all its equities may be ascertained, it is not necessary that the particular motions, &c., heretofore made, should be particularly noticed, because the direction of the court to the auditor will cover the whole ground. The same reason applies to the exceptions filed, The testimony of *McCulloh* is admitted, simply for the purpose of showing that no money passed at the execution of the release. For such a purpose our Court of Appeals have decided that parol evidence is admissible."

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

WILLIAM F. FRICK, and THOS. S. ALEXANDER, for the appellants contended,

1st. That *Hillen* is not entitled to priority of payment out of the fund in court, by virtue of his mortgage of 1826, because that has been released; nor by virtue of his mortgage of 1829, because that is posterior in date to those of the appellants.

2nd. That all the evidence in the cause offered by *Hillen* to contradict or explain the averment of payment, contained in his release of 1829, with a view to set up a still subsisting claim under his mortgage of 1826, and so to prejudice the claims and equities of the appellants, is entirely inadmissible.

3rd. That the release by *Hillen* to *Tschudy*, of the mortgage of 1826, even if the debt secured thereby be still unpaid, enured to the benefit of the appellants; and gave them the prior title, both legal and equitable, to the mortgaged property.

4th. That *Hillen* had no equity to be substituted, in any event, to the appellants' lien upon the city lots; inasmuch as said lots, when mortgaged to the appellants, were not the property of *Tschudy*, but of his wife; and *Hillen* had therefore no right to object to the release of said lots, by the appellants, or to claim any advantage from such release, under any circumstances.

5th. That if *Hillen* had an equity to be substituted to the

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appellants' lien upon the city lots, by reason of their having two securities, and he but one, the appellants had still a valid right, under the circumstances of this case, to release those lots without any responsibility to *Hillen* for the act. That the recording of *Hillen's* mortgage of 1829, (which was posterior to those of the appellants,) did not operate as a constructive notice to them of its existence; that they had no actual notice of its existence, nor notice of any kind from *Hillen*, imposing on them an equity to retain those lots, for his ultimate security. And that he has therefore no right or equity to complain of the release of said lots by the appellants, or to claim any advantage or priority over them, by reason of the same.

6th. That *Hillen*, by the release of his prior mortgage in 1829, gave to *Tschudy* the means of rightfully demanding from the appellants a release of the city lots; because the appellants could not reasonably withhold such a release from *Tschudy*, when he made it lawfully appear to them, that the prior liens upon the county lands, (by reason of which they had originally demanded a mortgage of the city lots, as additional security for their claims,) had all been discharged. That the said releases were executed by the appellants, only because of the record admission by *Hillen*, and in the belief thereby induced, that his prior mortgage had been paid: and it is therefore contrary to equity, that *Hillen* should be permitted to deprive the appellants of their prior lien upon the county lands, when, by his own acts, he has caused them to release the other ample security which they held in the city lots.

T. P. SCOTT, contended for the appellee:

1st. That his lien being *in fact* the oldest, and the appellants having taken their liens with knowledge of, and subject to, his lien, he was entitled to payment, in preference over them, out of the proceeds of the sale of the mortgaged property.

2nd. That he did not lose his priority by the arrangement of the 20th August, 1829, because it is in proof by the documentary evidence, viz: the deed of 27th July, 1826, and the two deeds of 20th August, 1829, as well as by the testimony

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of *McCulloh*, that the debt due to the appellee mentioned in the mortgage of *20th August*, 1829, is the same debt mentioned in the mortgage of *27th July*, 1826; and because the arrangement of *20th August*, 1829, was neither designed or liable to prejudice or mislead the appellants.

3rd. That the deeds referred to in the second point, and the deposition of *McCulloh*, are admissible and competent evidence to prove the identity of the debt due the appellee, mentioned in the mortgage of *20th August*, 1829, with the debt mentioned in the mortgage of the *27th July*, 1826.

4th. That if the court should consider that the appellee lost his priority by the arrangement of the *20th August*, 1829, yet he is still entitled to priority of payment out of the sales of the mill seat, over the appellants, because the appellants had two securities or sources of payment to look to, viz: the mill seat and the city lots, whereas the appellee could only look to the mill seat for payment of his claim.

5th. That the city lots embraced in the mortgage to *Woollen* and to *Kurtz*, were sufficient in value to have paid each of their claims; and that the deposition of *Brown* is admissible and competent to prove the fact, and that the appellants having voluntarily and without the assent of the appellee, given up their security on the city lots, cannot thereby be permitted to prejudice the equity of the appellee, as contended for in the fourth point.

SPENCE, J., delivered the opinion of this court.

The prominent facts in this case, and those upon which it must be decided, are as follows.

On the *27th* day of *July*, 1826, *Tschudy* executed a mortgage to *Hillen* and *Brice* to secure the payment of certain sums of money. This mortgage to *Hillen* and *Brice*, included only a part of the land owned by *Tschudy* in *Baltimore* county. On the *2nd* of *June* 1827, *Tschudy* and wife executed a mortgage to *Mary Kurtz*, to secure the payment of \$1000. This mortgage included the ninety acres of land in *Baltimore* county, and certain lots of ground in *Baltimore* city, which

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belonged to the wife of *Tschudy*. On the 17th day of June 1828, a similar mortgage was executed by *Tschudy*, on the same real estate to *House, Woollen, & Co.*

On the 20th day of August 1829, *Hillen* and *Brice*, by their deed, regularly executed and acknowledged, released their mortgage of the 27th July 1826, and on the same day the deed of release was executed by *Hillen* and *Brice* to *Tschudy*, *Tschudy* executed to *Hillen*, a mortgage of the same land which had been thus released to him by *Hillen* and *Brice*.

In the year 1830, the mortgagees *Kurtz* and *Woollen* and others, executed a deed of release of the city lots which had been included in their mortgages.

The land included in *Hillen's* mortgage lying in *Baltimore* county, has been sold under a decree passed in this case, on a bill filed by the executors of *Woollen*, and the question is, which of the mortgagees are entitled to priority, or to be first paid out of the fund?

This question necessarily brings up for consideration and decision, the effect and operation of the deed of release of the 20th day of August 1829 of the mortgage of the 27th July 1826, from *Hillen* and *Brice* to *Tschudy*. On the part of the appellants it is insisted, that this deed was an entire and absolute release on the part of *Hillen* and *Brice*, of their lien under the mortgage of 1826, and consequently deprived them of any priority. This conclusion is denied on the part of the appellees, and they insist that the deed of release of 1829, when taken in connection with the parol testimony of *McCulloh*, cannot in equity have the operation and effect to deprive *Hillen* of his priority upon the fund in question.

McCulloh's testimony out of the case, and there could be no question as to the operation and effect of *Hillen's* and *Brice's* deed of release.

It may be conceded, that there are many decisions in which courts both of law and equity have determined, that receipts in deeds are only *prima facie* evidence of payment, and that parol evidence is admissible to contradict such receipts, but we have never yet seen the decision, fraud out of the question,

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which went so far as to decide that parol evidence was admissible, to vary, contradict and render utterly void a solemn deed.

On what other imaginable ground, can it be insisted in this case, that *Hillen* is the prior incumbrancer? If he had never secured any lien before the mortgage of 1829, it could not be said, that his lien was prior to *Kurtz*' mortgage of 1827, and if the release of 1829 released his lien of 1826, his lien arises under the mortgage of 1829, more than two years subsequent to *Kurtz*' deed of 1827.

But the appellee's solicitor insisted in the argument, that the deed of release and the mortgage of 1829, having been executed simultaneously, *Hillen* did not thereby lose his priority as incumbrancer, and cases of dower, in which courts have adjudged that in cases of instantaneous seizin, where the husband had or took no beneficial interest, the widow was not dowable, were referred to. We think such cases are clearly distinguishable from the one under consideration. In the former cases, there never was any such estate in the husband, upon which the widow's right of dower could attach; in this case there was a lien under the mortgage to *Kurtz* of 1827, subject to be defeated only by *Hillen*'s prior mortgage of 1826, and if the lien of *Hillen*'s mortgage of 1826, was released by his deed of 1829, we can see no ground upon which *Kurtz*' priority can be defeated.

It is insisted by the appellee's solicitor, that if the court should consider, that the appellee lost his priority, by the arrangement of the 20th August 1829, yet he is still entitled to priority of payment out of the sales of the mill seat over the appellants, "because the appellants had two securities or sources of payment to look to, viz: the mill seat and the city lots, whereas the appellee could only look to the mill seat for payment of his claim."

It must be borne in mind that the city lots were the property of *Tschudy*'s wife, and that *Hillen* was not a creditor of *Mrs. Tschudy*, and had no claim upon them as a creditor. The doctrine seems to be well settled in courts of equity, that where there are two mortgagees under separate and distinct mortgages, and one and the same mortgagor and the prior mortgagee,

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have a lien on two distinct funds or estates, and the second have a lien on one only of these funds or estates, that courts of equity will coerce the prior incumbrancer to resort to that fund, for the satisfaction of his lien, on which the subsequent mortgagee has no lien, and this for the protection of the subsequent incumbrancer.

This case now under consideration differs in an essential particular from the one supposed. In this case the prior mortgagee, *Kurtz*, had a lien on two separate and distinct estates, of two separate and distinct mortgagors, and the subsequent mortgagee, held in lien on one only of the estates incumbered by the prior mortgagee, and the estate released by the prior mortgagee, was the estate on which the subsequent mortgagee had no lien, it being the estate of *Tschudy's* wife. If the prior mortgagee, *Kurtz*, foreclose his mortgage on the estate of *Mrs. Tschudy* by sale, a court of equity considering her as a security of her husband, would substitute her to *Kurtz's* equities on the estate of her husband, and thereby exclude the subsequent mortgagee. *Vide 2 Story's Eq., sec. 1373.*

The orders of the court in this case, of the 2nd March 1849, and the 29th of March 1849, are reversed with costs to the appellants, and the case remanded.

ORDERS REVERSED AND CASE REMANDED.

ZACHARIAH H. WORTHINGTON, EXC'R OF WM. WORTHINGTON, vs. ELEANOR OWINGS, BY HER NEXT FRIEND, J. W. OWINGS.—*December 1850.*

A testator directed his executors to sell certain real estate, and as soon as the proceeds were collected, to divide the same into eight equal parts, and "to hold one share in their hands for the separate use and maintenance of the testator's daughter and her children, or to invest the same in lands to be

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settled in trust on his said daughter and her heirs forever, for the sole use and maintenance and support of her and her children, without the control of her husband, as to his executors should seem most expedient." The acting executor sold a part of the land and retained the proceeds in his hands, not being able, as he alleged, to invest it in lands. **HELD:** That the testator designed that the principal of the sum devised to his daughter, should not be diminished; that the interest alone should be applied to her maintenance and that of her children, and that the executor was bound to pay interest on the sum so retained by him.

With respect to this fund, the executor was invested with the powers and responsibilities of a trustee, and if he was unable to invest it in land, and did not choose to retain it upon condition of paying interest, it was his duty to apply to a court of equity, for an order directing a temporary investment of it, so as to make it productive.

APPEAL from the equity side of *Montgomery* county court.

The appellee filed her bill in the court below, claiming as a devisee under the will of the appellant's testator, which will directs the proceeds of certain real estate, to be sold by the executors, to be distributed among the children of the testator. (The whole of the clause relating to this controversy, will be found in the opinion of this court.) The bill alleges a sale of a portion of the lands, and report thereof to the orphans court, an audit of the same, and an order thereon to pay part thereof, \$90.96, to the complainant, which it charges should have been invested on the 18th of July 1839, and another part, \$387.40, which should have been invested in August, 1846. It charges that the appellant has failed to invest, and refused to pay over to the appellee, and prays an order that the money may be brought into court, to be invested under the direction thereof.

The answer alleges that respondent has always been ready and willing to pay to any one legally authorised to receive it, the share assigned by order of the orphans court to the complainant; that he has held it according to the will, for the separate use and maintenance of her three children, and offered to pay it to her trustee on receiving a bond of indemnity, which complainant declined. He could not invest it in land, because the fund was too small, and the testator designed the whole lands should be sold before a distribution, and he has used his

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utmost efforts to effect a sale. The respondent offers to pay the share in his hands, but insists, "he is not liable for interest as there was no one in existence to whom he could pay them, and the funds have been unproductive in his hands."

The cause was submitted on bill and answer, and the court, (WILKINSON, A. J.,) decreed, that the appellant bring into court the sum of \$387.50, with interest on 90.96 $\frac{1}{2}$, from the 18th of July, 1839, and interest on \$296.43 $\frac{1}{2}$ from the 28th of August, 1846, from which decree the defendant appealed.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

By R. J. BOWIE, for the appellant, and
By KILGOUR for the appellee.

MAGRUDER, J., dissented, and delivered the following opinion:

I cannot agree with my brothers that this decree ought to be affirmed. The trustee has made no use of the money; was not authorised by the will to make the proposed investment, and was bound to retain the money, in order that he might invest it in real estate, whenever an opportunity offered. See *Gassaway and Darne vs. Cutlett*, 6 H. & J., 475.

The chancellor could not authorise the trustee to lend out this money, and thus alter the will. If the will of the testator had been, that the money when received, should be invested in some safe fund, then the trustee would have been authorised to lend it out, and the chancellor, upon application, might have directed the trustee so to invest it.

The appellant is in no default, as it is not pretended he ever had an opportunity of investing the money in real estate.

The chancellor has no more power in such a case to direct the trustee to lend out the money on security, than the trustee has to do it against the chancellor's direction. This would be to alter the will.

A direction to invest money in real estate, is a direction to invest it in no other way; to retain the money until the trustee

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has an opportunity of so investing it, and when such an opportunity does offer, it would be no apology for not making such an investment, that he had placed the money out of his reach, by lending it upon good security. Even the *cy. pres* principle, cannot authorise any thing of the kind.

A power to alter a man's will, ought not to be possessed by the chancellor or any other person.

But in this case, the time for the investment had not arrived. A considerable portion of the testator's land had not been sold, and this was not the fault of the trustee. Surely he could not be required to purchase land as soon as any part of the appellee's portion of the money was received by him.

MARTIN, J., delivered the opinion of this court.

This is an appeal from a decree of *Montgomery* county court as a court of equity, directing that the appellant bring into court upon the day specified, the sum of \$387.50, with interest on \$90.96 $\frac{1}{2}$, from the 18th of July, 1839; and interest on \$296.43 $\frac{1}{2}$, from the 28th of August 1846.

We do not understand the counsel for the appellant, as objecting to so much of this order as directs the fund in question to be brought into court. That part of the decree is alone controverted as erroneous, which charges the appellant with the payment of interest on the sums enumerated; and the correctness of the opinion pronounced by the court below, in this respect, depends entirely upon the construction of the will of *William Worthington*; under which the appellee claims.

By this will the testator among other bequests and devises, directed his executors to sell his real estate in *Maryland* and *Virginia*, as therein described, and as soon the proceeds thereof should be collected, they are required, after deducting certain pecuniary legacies, to divide the same into eight equal parts, and "to hold one share in their hands for the separate use and maintenance of the testator's daughter, *Eleanor Owings*, and her children, or to invest the same in lands, to be settled in trust, for his said daughter *Eleanor*, and her heirs forever, for the sole use and maintenance and support of her and her children,

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and without the control of her husband, as to his executors should seem most expedient.”

This is the only provision in the will, that bears upon the question under consideration. It is apparent, we think, from the language used by the testator, that he intended, that the principal of the small sum devised to the appellee, should not be lessened or impaired, and that the profit or interest arising from this sum should alone be applied to the maintenance of his daughter, and her children; and it is equally clear, that this purpose of the testator could only be accomplished, upon the supposition, that when he gave to his executors the privilege, at their election, and in their discretion, to hold this fund in their hands, instead of investing it in land, he meant, that it should be so held by them upon the condition, that they paid interest on it.

This we regard, as the true construction of this will, and the character of the trust imposed upon the executors by its provisions. It appears that one of the persons named as executor has renounced this trust. It was however accepted by the appellant. Having accepted it, he was bound to execute it, according to its terms; and we have already declared, that this trust by its nature and terms, imposed upon the executor, who undertook to discharge it, occupying as he did the position of a trustee, the obligation to pay interest on the money devised to the appellee, and which he retained in his hands. Upon this ground, we think, the decree of the court below must be affirmed.

The view we have thus taken, of the obligation imposed by the nature of this trust upon the executor, is not, we think, to be resisted by the argument, that it appears from the answer, that the fund was in fact unproductive; that the appellant was unable to invest it in land, and that he had no right to use it; and that it is unjust and unreasonable to charge him with interest on money, which he had no power to employ.

An argument of this kind would proceed, we think, upon a misconception of the will. It certainly would be a very harsh and unreasonable rule, the operation of which was to subject a

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party to the payment of interest, on money which he had no right to use. When, however, the testator declared that this money might be retained in the hands of his executors, if they preferred this course to an investment of it in land, we do not understand him to have intended, that the money should remain in their hands, a barren and unproductive fund. Such an idea is inconsistent with the intention of the testator, to apply the income or interest produced by the fund, to the support of his daughter, and her children. What the testator meant, was, that his executors should have the control of the fund, with the right to use it. For certainly, as soon as it is determined, that the party who holds the money is chargeable with interest on it, it follows as a consequence, that he has a right to employ it; the obligation to pay interest on the fund, necessarily involving the right so to use and employ it, as to make it productive.

With respect to this fund, the appellant was invested with the powers and responsibilities of a trustee. Devoted as the *interest* of the fund was by the testator to the maintenance of his daughter, and her children, it could only answer the purpose for which it was created, by being made productive. And if the appellant was unable to invest this money in land, and did not choose to retain it in his hands upon the condition of paying interest on it, it was his duty by an appropriate proceeding to have obtained from the court of chancery, or from *Montgomery* county court, as a court of equity, an order for its investment. The court of chancery could have no difficulty in directing a temporary investment of this fund, so as to make it productive, and in this way contribute to the support of the beneficiaries, until an opportunity occurred for investing it in land.

DECREE AFFIRMED, WITH COSTS.

Leighton vs. Preston and Hepburn.—1850.

SIMON LEIGHTON, USE OF KELLY, BALL AND Co., vs. Wm. P. PRESTON AND HYATT P. HEPBURN.—December 1850.

Certain goods were mortgaged by the owners, to the plaintiff, to secure a debt due from the former to the latter. The mortgagors afterwards conveyed the same goods to the defendants, in trust to sell and distribute the proceeds among the creditors of the grantors. The defendants under this deed of trust, sold the goods, and received the proceeds. **HELD:**

That in making this sale the defendants committed a tort, for which they would be answerable in damages, to the plaintiff, who could either sue for the tort, or waive it and claim the proceeds, to satisfy his mortgage debt, in an action for money had and received.

Where a mortgage contains no covenant, that the mortgagor shall remain in possession until forfeiture, the mortgagee is to be deemed the owner of the property.

On the day after the sale, the mortgagee executed an assignment of his interest in the mortgage, to a third party. **HELD**, that this did not give to the assignee a right to sue, in an action of assumpsit, in his own name: this action must be instituted in the name of the mortgagee, the party by whose authority the sale, to be a legal one, must have been made at the time it was made.

APPEAL from *Baltimore* county court.

This was an action of *assumpsit* brought by *Leighton* the legal plaintiff, for the use of *Kelly, Ball* and *Ricards*, against the appellees. The *nar* contains a count for goods sold and delivered, the common money counts and a count on an *insimul computassent*. The plea was *non assumpsit*.

The facts of the case embodied in the exception are as follows: On the 21st of January 1845, the firm of *Rosenthal* and *Mosher*, mortgaged to the legal plaintiff, *Leighton*, certain goods to secure a debt of \$330, for which they passed him a promissory note, dated the same day with the mortgage, and payable in sixty days. This mortgage contained no stipulation that the mortgagor should remain in possession until forfeiture. On the 25th of January 1845, the same firm executed to the defendants, the appellees, a deed of all their property real and personal, in trust to sell the same, and pay, 1st, expenses of the trust, a commission of 10 per cent. to the trustees; and 2nd, to distribute the residue equally among the creditors of the firm. The defendants under this deed took possession, and on the 7th of

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February 1845, sold the goods covered by the mortgage. On the 8th of February 1845, *Leighton*, the mortgagee, assigned the mortgage to the *cestui que uses*, *Kelly, Ball and Ricards*. This assignment recites, that *Leighton* for a valuable consideration, has transferred the promissory note to said *Kelly, Ball and Ricards*, and in order to give them the full benefit of the security under said mortgage, has agreed to execute this assignment.

Upon these facts the defendants prayed the court to instruct the jury, that if they find from the evidence, that the note recited in the mortgage, was, on or before the 8th of February 1845, transferred by *Leighton*, for value received, to *Kelly, Ball & Co.*, and that said mortgage was *also* transferred fairly and *bona fide*, and for value received, by *Leighton* to said *Kelly, Ball & Co.*, by assignment dated 8th of February 1845, and shall further find that said assignment was executed, acknowledged, delivered and recorded, on the day of its date, then the plaintiff is not entitled to recover in this case.

The plaintiff then offered *four* prayers.

1st. That if the jury shall believe that the said mortgage, was executed and delivered *bona fide*, on the 21st January 1845, to the plaintiff, and that it was duly recorded on the 3rd February 1845, and that defendants took possession of and sold the goods covered by the mortgage, as stated above, then the plaintiff is entitled to recover in this action, so much as the jury shall believe is sufficient to pay the debt of the plaintiff, secured by the mortgage.

2nd. That the promissory note mentioned in said mortgage, is not the cause of action in this suit.

3rd. That the transfer of the said promissory note mentioned in the plaintiff's 2nd prayer, to *Kelly, Ball and Co.*, as stated in the assignment of the mortgage, dated 8th February 1845, did not carry with it the *legal* title in the mortgaged property.

4th. That the assignment of the mortgage from *Leighton* to *Kelly, Ball & Co.*, did not operate as a special endorsement of the said note to the said *Kelly, Ball & Co.*, but only as a transfer of the debt, intended to be secured by said note.

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The court (LE GRAND, A. J.,) granted the prayer of the defendants, and the second prayer of the plaintiff, but rejected the *first*, *third* and *fourth* prayers of the plaintiff, to which granting of the prayer of defendants, and refusal to grant said prayers of the plaintiff, the latter excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

By GWINN and CAMPBELL, for the appellant, and
By PRESTON and BRENT, for the appellees.

MAGRUDER, J., delivered the opinion of this court.

The appellant claims in this suit a sum of money, which he alleges was received by the appellee for his use.

The facts may be given in a few words. Goods were conveyed, by the owners of them, to the appellant, in order to secure the payment of a sum of money due from the former to the latter. Subsequently to the date of this deed, the same persons conveyed them to the appellees, who made sale of them on the 7th February 1845, and received the purchase money.

In making this sale the appellees committed a tort, for which damages might be recovered. But the party who could have sued for the tort, might waive it, and claim the proceeds of sale, or a part thereof, in an action for money had and received.

According to the decision of this court in the case of *Jamieson vs. Bruce*, 6 G. & J., 72, the appellant is to be deemed the owner of the property conveyed to him, and his right to institute this suit could not be controverted, if there existed no other fact in the case. It seems though, that on the 8th September, (the day subsequent to the sale of the goods by the appellees,) the appellant, himself, executed a deed, thereby designing to assign to the persons, for whose use this suit was brought, his interest in the deed of mortgage, and because of the execution of this instrument it is insisted, that this suit ought to have been instituted in the name of the *cestui que use*, instead of the appellant. This is the material question upon this appeal.

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It is thought that the court below erred, in instructing the jury, at the instance of the defendant, that upon this statement the action could not be sustained.

The suit might have been instituted for the conversion of the property, or for money had and received. The latter was preferred. The defendant, then, is to be regarded as a person duly authorised to sell, and to receive the proceeds of sale. For whose use did he receive them? Surely for the use of the person, who, at the time, was the owner of the goods, and who alone could then authorise him to make the sale. But the *cestui que use*, it is said, is, by virtue of the assignment, entitled to the money, (or a part of it,) for which the goods were sold. This is true, but then if compelled to sue for it, he must make use of the name of the assignor, as he cannot allege that this money was received for his use, when, at the time it was paid to the defendant, the *cestui que use* had no interest in the goods.

If this action for money had and received, can be brought at all in this case, (and this is not doubted,) then the legal plaintiff must necessarily be the person in whose name, though for the use of another, it is to be prosecuted. The sale is to be considered as made by authority derived from him; the money was received, at the time it was paid, for his use; and though he has since assigned all interest in the debt, and the property to secure that debt, yet this assignment did not give to the assignee a right to sue in his own name.

If instead of an action for money had and received, it had been thought proper to bring an action of trover for the conversion of these goods, that action must have been brought in the name of the person who was the owner of the goods at the time of the conversion; and so the action which was preferred, must be instituted in the name of the person by whose authority the sale, to be a legal one, must have been made at the time it was made: although if the sale had not been made until after the assignment, the suit could not have been instituted in the name of *Leighton*.

In deciding this question, we cannot antedate the assign-

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ment, nor *post-date* the sale and receipt of the purchase money. On the day of the receipt of the money, the appellant had a *chose in action*, which he is permitted to assign.

So, too, notwithstanding the *tort*, if the plaintiff chooses to sue for money had and received, neither party can allege that, the legal plaintiff on the day after the sale, could, by deed, transfer the legal title to the goods; as neither can say, that on that day the legal plaintiff had not parted with his title to the goods. This would deny the plaintiff's right to waive the *tort*, and affirm the sale, made on the 7th September.

The defendant being the mortgagee of the equity of redemption, is entitled to the money, provided he satisfied the mortgage. It is to recover the amount due on this mortgage, that this action is brought; and it cannot be said that the assignment of a later date, was such an assignment as required the assignee to institute the suit in his own name.

The court below erred in granting the prayer of the defendant, and in rejecting the first prayer of the plaintiff.

With respect to the third and fourth prayers of the plaintiff, we do not discover that they were warranted by the testimony, and for this reason we affirm them.

In refusing to give the first instruction prayed by plaintiff, and in granting the prayer of defendant, the court erred.

The rest affirmed.

JUDGMENT REVERSED, AND
PROCEDENDO AWARDED.

ETHELBERT TANEY vs. JOHN BACHTELL.—December 1850.

To an action of covenant upon certain articles of agreement, the defendant pleaded performance on his part, upon which plea was the only issue in the case. The plaintiff, besides the written agreement, offered parol testimony, to remove the uncertainty of the description of the land in the

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agreement, which the county court admitted. The jury gave a verdict for the plaintiff, and assessed damages. **Held:**

That this testimony was inadmissible for any purpose under the issue in this case, and as this court cannot say that it had no influence on the jury in assessing the damages, its admission is a good cause for the reversal of the judgment.

Where evidence is offered without its being stated for what purpose it is offered, it is error to reject it if it was admissible for any purpose.

An agreement under seal for the conveyance of land, described it as "a farm on which is a grist mill, saw mill and milling apparatus, containing 230 acres." **Held:** That this description is uncertain, and the uncertainty cannot be removed by parol testimony.

This being a contract relating to land, every part of it must be in writing, and verbal testimony cannot be admitted to supply any defect or omission in it.

APPEAL from *Washington* county court.

This was an action of *covenant*, instituted by the appellee against the appellant, upon the following agreement.

"Memorandum of an agreement made this 16th day of February, 1848, between *Ethelbert Taney*, of *Hancock, Washington* county, *Maryland*, of the one part, and *John Bachtell*, of *Morgan* county, *Virginia*, witnesseth, that said *Taney* agrees to transfer his present stock of merchandize, together with the house and lot situated in the west end of *Hancock, Maryland*, and at present occupied by said *Taney* to the said *Bachtell*, for and in consideration of a farm, on which is situated a grist mill, saw mill and milling apparatus, said farm containing two hundred and thirty two acres; the said *Taney* is to allow the said *Bachtell* the sum of three thousand dollars, to be paid in merchandise at cost prices, with an advance of five per cent. for freight, &c. The said parties agree that an inventory shall be taken between the 1st and 5th of March next. It is also understood that the said *Taney* is to have the grain at present in the ground on said farm, and that the said house and lot now in possession of said *Taney*, is to be transferred to the said *Bachtell* for \$700. **ETHELBERT TANEY.** (Seal.)
JOHN BACHTELL, (Seal.)"

"*N. McKinley.*"

The pleadings are fully stated in the opinion of this court.

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EXCEPTION. The plaintiff offered in evidence the agreement, and then certain parol testimony, which is recited in the opinion. To the agreement and parol evidence thus offered, defendant objected, and prayed the court to instruct the jury that upon said agreement the plaintiff was not entitled to recover, because it gives no description and no locality to the land therein mentioned, and is void for uncertainty; and that such description cannot be aided by parol testimony; which opinion the court, (WEISEL, A. J.,) refused to give; but permitted said agreement and evidence to go to the jury; the defendant excepted. The jury rendered a verdict for the plaintiff, and assessed the damages at \$200. Upon this verdict judgment was given for plaintiff, and the defendant appealed.

The cause was argued before MAGRUDER, MARTIN, and FRICK, J.

PRICE, for the appellant, contended, that the parol evidence admitted by the court, should not have been received, the effect of that testimony being, to add to a written agreement.

SPENCER and ROMAN, for the appellee, insisted, that the evidence was properly admitted : because

1st. There is no uncertainty in that part of the agreement, which prescribes the obligation of *Taney*, the defendant below.

2nd. If there be uncertainty in that part which sets forth the obligation of *Bachtell*, it is merely the consideration for *Taney's* agreement, and being under seal, he would be bound, without any consideration.

3rd. The parol evidence was properly admitted, not to explain the agreement, but to point its application.

4th. The supposed defect in the agreement, is fully disclosed in the declaration, and the defendant should have demurred. By his pleading he has taken issue on the fact, and waived the legal insufficiency of the agreement.

MAGRUDER, J., delivered the opinion of this court.

This suit was brought in *Washington* county court by the

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appellee, in order to recover from the appellant damages, for the non-performance by him of certain articles of agreement. It appears that by those articles of agreement, entered into 16th July 1848, the appellant was to transfer certain goods with a house and lot in *Hancock, Maryland*, to the appellee, "for and in consideration of a *farm* on which is situated a grist mill, saw mill and milling apparatus, said farm containing 232 acres."

The declaration alleges, that although he, (the appellee,) has performed or offered to perform every thing to be done on his part, yet the defendant would not perform any of the things to be done by him, but refused to transfer the merchandize and to convey the house and lot as stipulated, whereby the said *John*, (the appellee,) says he has lost and been deprived of all the benefits and advantages which would have accrued to him, by and from the performance on the part of the said *Taney*, and put to great loss and damage, by such violation in the loss of his business, to wit, to the value of \$1000, in the neglect and dilapidation of his property, &c.

To this declaration the appellant pleaded, that he had kept and performed all and singular the covenants and agreements, in the said articles of agreement contained, on his part to be performed and kept. The verdict being for the plaintiff, the case comes before us, upon a single exception taken by the appellant. According to this exception no proof was offered on the part of the defendant, but the plaintiff it is stated offered in evidence the articles of agreement, and then proved by witnesses, that the week before said agreement was made, the said defendant and his son came over to the residence of the plaintiff, being a farm in *Morgan county, Virginia*, containing 232 acres, on which is situated a grist mill, saw mill, &c., and was bargaining with plaintiff for it; offered \$2.500, the plaintiff asked \$3000; and also that between the 1st & 5th March 1848, plaintiff came over to *Hancock*, and asked for an appraisement of goods and merchandize, and then offered to give a good and sufficient deed for said farm, in *Morgan county, Virginia*, so soon as the goods and merchandize should be appraised.

To all this proof the defendant objected, and the exception

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is taken because of the admission by the court, of the said articles of agreement, and parol evidence to go to the jury. We are now to decide whether the court below erred in admitting this testimony, and if it did, whether because of such error the judgment must be reversed.

If to the declaration filed in this case the defendant below had demurred, then the question which has been argued at bar could have been disposed of in a few words. The defendant however instead of demurring, or denying a performance of the covenant by the plaintiff below, relies in his defence entirely on a performance of the articles of agreement by himself. The single point put in issue, was whether the defendant had performed the covenant, not what the plaintiff had done, or offered to do. It would be difficult to prove, that for the alleged uncertainty, in the description of the farm to be conveyed by the plaintiff in the court below, the jury could have been authorized to find a verdict for the defendant, thereby declaring neither more nor less, than that the defendant had performed his part of the agreement.

This testimony was offered by the plaintiff in the court below, without stating for what purpose it was offered, and it is insisted, that if for any purpose it was admissible in the trial of the issue, than for the admission of it by the court below, the judgment ought not to be reversed. This is true, but is it admissible for any purpose? Certainly it was not necessary in order to entitle the plaintiff to a verdict, and although admitted it could not prejudice the defendant, if the jury had only to say whether the defendant, had or had not performed every thing which by the covenant he was bound to perform. As the defendant offered no proof, in support of his plea of performance, the plaintiff might then insist, that if the court erred in admitting the testimony, it was an error by which the defendant was not at all injured, and for which therefore he cannot ask that the judgment be reversed.

But the plaintiff being entitled to the verdict, because the defendant offered no proof in support of his plea, the jury were next to assess the damages for which the plaintiff was to have a

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judgment. Now this court cannot say, that this testimony had no influence upon the minds of the jury in assessing the damages, and of course, cannot say, if there was error, in admitting this testimony, that the defendant was not aggrieved by it. Hence the necessity of inquiring, whether the testimony was admissible in the trial of this case.

If the court could not say that the farm spoken of by the witness, was the same farm mentioned in the articles, the testimony, it is apprehended, ought to have been excluded from the consideration of the jury, not because, if admitted, it would entitle the plaintiff to a verdict, (without it, the verdict must have been for him,) but because it was calculated to procure for the plaintiff larger damages than he was really entitled to.

We are thus brought to the inquiry, was this testimony admissible to prove, that the farm in *Morgan* county, *Virginia*, spoken of by the witness, was the farm which, by the articles of agreement, the plaintiff below was to transfer to the defendant, in exchange for the house and lot and merchandise of the latter? Is not the description of the farm, in the articles of agreement, uncertain, and can that uncertainty be removed by parol testimony?

It is thought that these are questions, which have been settled in *Maryland*. The agreement, itself, certainly does not tell us that the farm, which the defendant in the court below was to receive, was the farm on which the plaintiff then resided, or, indeed, in what county or State that farm is situated. It is very much more uncertain, than the description of the land, which was a subject of controversy in the case of *Dorsey vs. Wayman*, 6 Gill, 66. In that case the name of the land was given, and although it related only to a part of the tract, it was that part adjoining the turnpike. The description was too uncertain, because it gave but one line of the land, and the others could not be known "from the agreement itself, or by anything referred to in it." In the case of *Thomas vs. Turvy*, 1st Harris and Gill, 435, the name of the land was given, but only a part of it, (without describing it by metes and bounds,) was sold. The plaintiff located the part which he

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claimed in virtue of his purchase, and there was no counterlocation. The court said, the ambiguity on the face of the deed could not be explained by extrinsic circumstances; the uncertainty could not, by any possibility, be explained by matter *dehors* the return.

We are sometimes misled, by applying to one class of cases *dicta* to be met with in the books, used in reference to a different class. This being a contract relative to land, must be, every part of it, in writing, and cannot be valid if partly in writing, though the deficiency could be supplied, if verbal testimony was admissible. "It not necessary," says *Greenleaf*, (1st vol., sec. 268,) "that the written evidence required by the statute of frauds, should be comprised in a single document, nor that it should be drawn up in a particular form. But it must all be collected from the writings; verbal testimony not being admissible to supply any defects or omissions in the written evidence. For the policy of the law, is to prevent fraud and perjury, by taking all the enumerated transactions entirely out of the reach of any verbal testimony whatever."

If such a description of this land was not too uncertain, or could be made certain by parol proof, the statute of frauds, (the clause which relates to contracts for land,) would be without meaning.

JUDGMENT REVERSED WITH COSTS, AND
PROCEDENDO AWARDED.

ELI BEATTY, TRUSTEE IN INSOLVENCY OF JOHN DAVIS *vs.*
CHARLES DAVIS AND OTHERS.—*December* 1850.

An assignment of the whole of a debtor's property, which provides that one class of creditors shall be preferred to another, and the surplus, if any remains after payment of all debts, to be paid to the grantor, unless tainted

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by fraud, is good both at common law, and under the statute of 13th Elizabeth.

The reservation in such an assignment of the power to the trustee, to mortgage the property conveyed to him, if he should deem it necessary to do so for the purposes of the trusts, does not vitiate the conveyance.

To render a deed of this description void under the insolvent laws, there must be a two fold intent, the intent to apply, and the intent to prefer.

The answer of the debtor, who was made a defendant, responsive to the bill, denying that he made the transfer, with a view or under an expectation of applying for the benefit of the insolvent laws, is conclusive upon the question of intention, unless overcome by the testimony of two witnesses, or of one with corroborating circumstances.

The circumstances of this case, distinguished from those of *Dulany vs. Hoffman*, 7 G. & J., 170.

It is no objection to the competency of a witness, that he is the solicitor for the party for whom he testifies, such objections go to the credibility and not to the competency of the witness

The admissions of a party on the record are evidence, although he stands in the attitude only of a trustee, provided the admissions were made after the fiduciary character has attached.

In this case the declarations and admissions of an insolvent trustee, a party on the record, made after he became such trustee, were held admissible in evidence.

APPEAL from the equity side of *Washington* county court.

The bill in this cause was filed on the 28th of June 1848, by the appellant, as the trustee in insolvency of *John Davis*, to vacate a deed made by said *Davis*, previous to his application, to his son *Charles W. Davis*. This deed is dated the 6th of October 1845, and embraces all the property, of every kind, of the grantor, which it conveys to the grantee in trust, to be sold and the proceeds of sale to be applied, *first*, towards the payment of "all taxes, liens, judgments and other incumbrances," and "a commission of five per cent. to the trustee;" *secondly*, "to pay and satisfy" *particular creditors*, whose names are set out in the deed, with the sums alleged to be due to each of them, amounting to \$27,048.88. These preferred creditors were all, with but few exceptions, either children, grand-children or other near relatives of the grantor. *Thirdly* after the payment of these sums, due the "several creditors specified," the balance of the proceeds of sales to be applied "if sufficient,"

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to the payment of all other debts and liabilities, and if not sufficient, to be *equally distributed* among the remaining creditors. The deed also provides, that “in case the said *Charles W. Davis* shall deem it necessary for the purposes of this trust, to mortgage the said real estate or any part thereof, he is hereby invested with full power so to do, and to execute all necessary deeds or conveyances, to secure the mortgage.” The grantor applied for the benefit of the insolvent laws, on the 1st of March 1848, and received his final discharge on the 12th of December 1848. The appellant as his insolvent trustee is the only complainant, no creditor having united in the bill. The grantor, the various *cestui que trusts*, and the grantee in the deed, are all made defendants. The grounds upon which the bill impeaches the deed, are fully stated in the opinion of this court.

The complainant afterwards filed a supplemental bill, in which he impeaches another deed executed by the same grantor, sometime prior to the deed impeached by the original bill, and which is described as a deed to his son *John Davis, Jr.*, for about 900 acres of land in *Allegany* county, and which it is alleged was executed either *without* consideration, or upon inadequate consideration, and which has never been paid, either to the grantor, or the complainant, his trustee. There is no allegation of existing insolvency at the time, on the part of the grantor, though it is stated he was largely in debt.

The defendants all deny the alleged collusion and fraud; they deny that the debts were fictitious, or that the grantor made the deed of the 6th of October 1845, with a view or under an expectation of becoming an insolvent debtor, or with intent thereby to delay or defraud creditors. In answer to the supplemental bill, the said *J. Davis, Sen.*, and *J. Davis, Jr.*, set forth in full, a record of a proceeding on the equity side of *Allegany* county court, as fully explanatory of the transactions between them, by which the son came into possession of the land now held by him, in *Allegany* county, and they rely on that proceeding in support of the son's title. The question as to the validity of this title, not being decided in this case, it is unnecessary to state the nature of said proceedings,

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in *Allegany* county court. All other facts necessary to an understanding of the opinion are stated in it.

A *pro forma* decree was passed by the court (WEISEL, A. J.,) below, dismissing the bill, from which the complainant appealed.

The cause was argued before MAGRUDER, MARTIN and FRICK, J.

By JOHN THOMPSON MASON, for the appellant, and
By GEO. SCHLEY and WM. SCHLEY, for the appellees.

MARTIN, J., delivered the opinion of this court.

The principal question presented for the consideration of the court by this record, is that which relates to the validity of the conveyance executed by *John Davis, Sr.*, to *Charles W. Davis*, on the 6th of October, 1845. This deed comprised the entire estate of the grantor, and was made in trust.

1st. To discharge the expences consequent upon the execution of the trust, with a commission of five per cent. to the trustee.

2nd. To the payment of all taxes, liens, judgments and other incumbrances resting on the property conveyed.

3rd. To the payment of certain preferred creditors, whose names are enumerated in the deed.

4th. After the payment of the sums due the several creditors specified in the preceding class, the proceeds of sale to be applied, if sufficient, to the payment of all other debts, and liabilities of the grantor, and if not sufficient, to be equally distributed among the remaining creditors.

5th. Should a surplus of the proceeds of sale, &c., remain, after payment of all costs, commissions, counsel fees, judgments, liens, incumbrances, and all the debts due and owing, or contracted by the grantor, either as principal, security or endorser, then to pay over such surplus to the grantor, his executors, administrators or assigns.

It appears from the record, that this case was submitted to

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Washington county court, as a court of equity. On the 30th of May, 1849, a *pro forma* decree was passed by that court, with the consent of the counsel concerned in the cause, maintaining the validity of the deed, and dismissing the complainant's bill. This correctness of this decree forms the subject of the present appeal.

The objections made to the deed, are:

1st. That it contains preferences and provisions, in contravention of the statute of 13 *Eliz.*, *ch.* 5, and is therefore to be treated as fraudulent upon its face.

2nd. That it was made with the view of creating surreptitious debts, and is to be considered as contaminated with actual fraud.

3rd. That the deed was made by the grantor, with the view, or under the expectation of being or becoming an insolvent debtor, and with an intent thereby to give an undue and improper preference to the preferred creditors therein specified; and is therefore to be condemned as in violation of the insolvent laws.

1st. There is no foundation for the first objection. The provision in the deed, that any surplus that may remain unabsorbed by the debts of the grantor, shall be paid by him, is of course unexceptionable. It only secures to him, by the terms of the conveyance, a right which the law would imply in his favor in the absence of any express reservation. This is the only reservation in favor of the debtor, to be found in the conveyance. And that a debtor in failing circumstances, apart from the provisions of an insolvent or bankrupt law, may, in virtue of that absolute dominion which he holds over his estate, make a *bona fide* assignment of the whole of it, for the payment of his debts, with stipulations in favor of preferred creditors, is certainly at this day, a legal proposition too firmly established to be controverted. *Hickley vs. Farmers and Merchants Bank*, 5 *G. & J.*, 377. *State of Maryland vs. Bank of Maryland*, 6 *G. & J.*, 205. *Niolon vs. Douglas*, 2 *Hill's Ch. Rep.*, 446. *Brasher vs. West*, 7 *Pet.*, 608, In this last case, it appeared that *West*, by a deed of the 21st of

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April, 1807, assigned all his estate to trustees to be sold, and the money paid first to certain preferred creditors, and afterwards to his creditors generally; and the Supreme Court, when speaking of this clause of the deed, said: “In *England*, such an assignment could not be supported, because it is by law an act of bankruptcy, and the law takes possession of the bankrupt’s estate, and disposes of it. But in the *United States*, where no bankrupt law exists for setting aside a deed honestly made for transferring the whole of a debtor’s estate, for the payment of his debts; the preference given in this deed to favored creditors, though liable to abuse, and perhaps to serious objections, is the exercise of a power resulting from the ownership of property, which the law has not yet restrained. It cannot be treated as a fraud.”

That the deed in question contains an assignment of the whole of the grantor’s property, and provides that one class of creditors shall be preferred over another class, is therefore no objection to it, unless tainted by fraud; the right thus to prefer one creditor or class of creditors, being a privilege secured to the debtor by common law, and not abridged or restrained by the statute of 13 *Elizabeth*.

By referring to this conveyance, it will be seen that the trustee is invested with the power of mortgaging the real estate conveyed to him, if he should deem it necessary to do so for the purposes of the trust, and it has been contended that the deed is to be considered as vitiated by this provision. We do not think so. It is entirely unlike the case where a power to mortgage was reserved to the debtor. That was properly treated as a badge of fraud. It left upon the mind the impression that the debtor’s control over the property continued, and that the assignment was colorable. But this is not the character of the power granted by the deed to this trustee. It was a beneficial power, introduced to enable the trustee to guard against a forced and ruinous sale of the property, and might have been most advantageously used for the interest of the *cestui que trusts*.

2nd. The second objection urged against the deed, is of a

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different character. It charges the design in the grantor to perpetrate actual fraud, by the creation of fraudulent and surreptitious debts. A charge imputing to this debtor a motive so corrupt as that alleged by the bill, is certainly not to be presumed. Has it been proved? We think not.

The class of debts against which this charge is directed, are the debts known in the proceedings as those due to various members of the *Watson* family, the children and grand-children of the grantor.

As to these debts, *William J. Ross*, in his answer in this respect responsive to the bill, states, that he knows that the debts due the *Hagerstown Bank*, the *Frederick Town Savings Institution*, *Mary A. Watson*, *Elizabeth A. Watson*, *Martha Watson* and *Fanny Watson*, are *bona fide* debts, and were so at the date of the execution of the deed. That the money or the claims due to *Mary*, *Elizabeth*, *Martha* and *Fanny Watson*, passed through his hands as administrator of *John Watson*, deceased, many years ago, upon the express pledge of the said *John Davis*, that he would pay or secure the payment of the said claims, and that at the date of the execution of the deed of trust, he urged upon the said *John Davis* the payment of the said claims, and the claim due *Mary J. Watson*.

John Davis, in his deposition, declares that he was in possession of nearly the whole of the *Watson* estate, amounting to about fourteen thousand dollars after deducting the amount due the deponent by the said estate; which sum of fourteen thousand dollars he had always promised to secure to the *Watson* family.

Each of the defendants in their answers to the bill, deny that the claims held by them against *John Davis* were fraudulent or surreptitious, as charged in the bill. These answers are strictly responsive to the bill. The testimony of *John Davis* stands unimpeached. And with these statements and this evidence before us, it is impossible to do otherwise than declare that this allegation is to be dismissed, as entirely unsupported by any proof in the cause. The charge of collusion is equal-

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ly barren of proof, and was not indeed relied upon in the argument.

3rd. The third objection raises the question, whether the deed in controversy was made by the grantor with a view, or under an expectation of applying for the benefit of the insolvent laws, and with an intent thereby to give an undue and improper preference to the creditors therein named.

To place a deed of this description within the operation of the insolvent laws, there must be a two fold intent. *5 Har. and John.*, 411. But as we think it perfectly clear upon the pleadings and evidence in this cause, that the grantor cannot be considered as having made the deed of the 6th of October, 1845, "with the view or under the expectation of being or becoming an insolvent debtor," it is unnecessary to inquire whether the assignment is to be regarded as voluntary, or as in compliance with the demands and solicitations of creditors, so as to place the case within the protection of the principle established by the decision in *Crawford and Sellman, vs. Taylor*, 6 *Gill and John.*, 323.

We have seen that this deed was executed on the 6th of October, 1845. It appears from the record, that *John Davis* applied for the benefit of the insolvent laws on the 1st of March, 1848. He was discharged on the 12th of December of the same year, more than two years after the date of the conveyance. In his answer to the bill of complaint, the defendant expressly denies that he made the transfer in question, with the view, or under the expectation of applying for the benefit of the insolvent acts; and an answer thus responsive to the bill, emanating from a party made a witness by the act of the complainant, speaking in reference to the motives and views, under the influence of which, the transfer in dispute was made, a matter lying necessarily within his own bosom, must be held as conclusive upon the question of intention, unless it is overcome by the testimony of two witnesses, or that of one witness with corroborating circumstances. *Roberts vs. Salisbury*, 3 *G. & J.*, 433. No such testimony has been presented by the complainant. After carefully collating the

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several answers made by the defendant to the various bills of complaint introduced into the record, we are satisfied that he is not obnoxious to the charge of inconsistency. The truthfulness of that part of the answer which contains a negation of the allegation, that he executed the assignment with the expectation of applying for the benefit of the insolvent laws, is sustained by the strong fact that there was an intervention of more than two years between the date of the transfer, and the period at which he placed himself under the protection of those laws. In the case of *Dulany vs. Hoffman*, 7 G. & J., 170, there was an interval of only seventeen days between the assignment and the application.

In this respect, this case is clearly distinguishable from that of *Dulany* and *Hoffman*. It is unlike that case in another most important feature. In the case referred to, the defendants left unanswered the allegation in the bill, that the goods in contest were delivered by them to *Hoffman* and *Bond*, with the view or expectation of becoming insolvent debtors, leaving upon the mind of the court, the impression, that this allegation was not answered, because it could not with truth be denied. But this is not the predicament of this defendant. He has subjected himself to no such injurious suspicions. In his answer to the bill, he has plainly and directly denied, that he made the deed in question, in contemplation of the protection afforded by the insolvent laws. The cases are dissimilar in all their material circumstances.

It is true, that by this assignment the grantor denuded himself of his whole estate, but the testimony shows, we think, that this was done, under the belief sincerely and honestly entertained at the period of the execution of the assignment, founded upon estimates carefully made, that his property would be amply sufficient for the payment of his debts.

Before leaving this branch of the case, it remains only to notice very briefly, the exceptions taken by the counsel for the appellant, to a portion of the testimony to be found in the record.

The first exception relates to the testimony of *Joseph J.*

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Merrick. The objection urged against the competency of *Mr. Merrick*, is, that he was at the time he was sworn, and still is one of the solicitors for the defendants.

This is a novel objection to the competency of a witness, and is placed upon two decisions in the *English Bail* court, cited in the case of *Potter vs. The Inhabitants of Ware*, 1 *Cush. Mass.*, 519. *United States Monthly Magazine*, Jan'y. 1851, page 57.

There is we think, no force in the objection. It is not pretended that this witness was incompetent on the ground of interest, and it is a well settled, and familiar rule, that by the common law, all persons are to be considered as competent witnesses, unless they are disqualified by want of capacity, or of religious faith, by infamy, or by a direct interest in the result of the suit.

Potter vs. Inhabitants of Ware, 1 *Cushing's Mass. Rep.*, 519. *Glenn vs. Von Kapff*, 2 *G. & John*, 134. Objections of this character go to the credibility, and not to the competency of the witness.

The counsel for the appellant has also excepted to the admissibility of the declarations of the complainant, as detailed by *Joseph J. Merrick*, because he is a mere nominal party to these proceedings, the creditors being the real parties in interest. There is no ground for this objection. It is apparent from the record, that these declarations and admissions were made by the complainant, after he had become the trustee of *John Davis*; and this being so, the point is covered by the case of *Dent vs. Dent*, 3 *Gill*, 482. It was in that case held, by the Court of Appeals, as indisputable law, that the admissions of a party on the record, are evidence, although he stands in the attitude only of a trustee, provided the admissions were made after the fiduciary character had attached.

The appellant's objection to the competency of *John Davis, Sen.*, on the ground of interest in this suit, must be also overruled. He could have had no interest in the result of this controversy, at the time of his examination as a witness, for the plain reason, that at that period it had been ascertained

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that his estate was totally insufficient for the payment of his debts. For him there was no surplus.

We think, therefore, that the deed of the 6th of October 1845, is free from objection, and is to be treated as a valid conveyance. Assuming this to be true, it is manifest, that the controversy with respect to the *Allegany* property, is not open for examination on this bill. With respect to the merits of the contestation relative to the lands in *Allegany* county, we desire to be understood as intimating no opinion. With that controversy we have, at present, no concern. For as the deed of the 6th of October 1845, vests in *Charles W. Davis* the entire estate of the grantor, embracing his land in *Allegany* as well as in *Washington* county, it is very clear, that if the agreement between *John Davis, Sen.*, and *John Davis, Jr.*, with reference to the *Allegany* property, is liable to be impugned, the proper party to assail it, is *Charles W. Davis*, invested as he is by the deed of 1845, with the legal title to this estate. We do not however mean to say, that if *Charles W. Davis* failed in this respect to discharge his duty, it would not be competent for the appellant to impeach this alleged contract in a bill properly framed for that purpose, and calling upon the conventional trustee to account to him for the manner in which he had administered the trust.

The decree of the court below is affirmed, with costs in both courts.

DECREE AFFIRMED WITH COSTS.

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HENRY POWLES, GEORGE W. HYDE AND OTHERS, vs. JOSEPH DILLEY, BARNEY DILLEY, BENJAMIN R. EDWARDS, AND THE MERCHANTS FIRE INSURANCE COMPANY.—
December 1850.

The common law has always sanctioned the right of one creditor to obtain the payment, or security of his debt, from the debtor, to the exclusion of other creditors.

To render a transfer to a favored creditor void under the insolvent system, the debtor must intend both to apply for the benefit of the insolvent laws, and intend to prefer the particular creditor or creditors; the guilty intent must concur in both particulars.

To ascertain this intent, all the facts and circumstances surrounding the case must be brought into view, and the court are as free to infer it from circumstances, as if it had been expressed by the party.

But the inference must be a fair and justifiable one from all the facts; one that leaves no doubt in the mind, that the party at the time contemplated an application for the benefit of the insolvent laws; and it is incumbent on the complainant to establish this motive where it is denied by the answer.

Where an assignment is assailed as a fraud upon the insolvent laws, the declarations of the parties to it, made at the time, showing that it was only executed after urgent persuasions on the part of the creditor, are admissible as part of the *res gesta*, to explain the motives and circumstances surrounding the assignment.

The rule, with but an occasional exception, is well established and of long standing, that the answer of one co-defendant is not to be received *against* another, because if the complainant wishes to establish a fact by the evidence of one defendant, he may examine him as a witness, which will afford the co-defendant an opportunity of a cross-examination.

But where the complainant calls upon a defendant to answer, he makes the latter a witness, and so far as the answer is responsive to the bill, it must be received against the complainant, and it cannot be excluded because there is a co-defendant in whose *favor* it may and does consequentially operate.

A party who cites a witness and examines him, is not at liberty to reject his testimony afterwards.

It is no objection to the validity of this assignment that it was made after the filing of a former bill, against the same parties, which was subsequently dismissed, and the existence of which was not known to the parties until after the assignment was made, which was done before the institution of the present suit.

Where a trustee, in two characters, has the means of committing fraud, as

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trustee and purchaser both, a court of equity will interpose, and not compel the party to wait until the mischief is done.

If property in the hands of an insolvent trustee is not secure, and is about to be wasted and applied by the trustee to his own use, a court of equity may interfere to prevent the abuse of the trust, until the proper remedy can be applied, provided the mischief be irreparable, or the consequences of such a character as to be without relief, except in equity.

But where there is adequate remedy pointed out by law, equity will not interfere; more especially where the party sought to be affected by the proceeding, derives his power under a special jurisdiction, and is made responsible to that jurisdiction for the exercise of his trust.

The court of chancery has no jurisdiction over the appointment and removal of trustees of insolvent debtors, the whole subject being regulated by statutes, and resting with the courts of law.

The whole administration of the insolvent's assets, is confided exclusively to the courts of law.

The authority of a court of competent jurisdiction, when coming incidentally in question, is conclusive of the matter decided, and cannot be impeached on the ground of *informality* in the proceedings, or mistake or error in the matter on which they have adjudicated.

Where the question of the appointment of an insolvent trustee arises incidentally in other courts, it is not competent there to inquire, whether he was rightfully appointed or not.

APPEAL from the *Court of Chancery*.

This appeal was taken by the appellants, creditors of *Barney Dilley* and *Benjamin R. Edwards*, two of the appellees, from an order of the chancellor passed on the 13th of March 1849, dissolving an injunction and dismissing the bill of the appellants, which they had filed for the purpose of vacating an assignment of a policy of insurance, of the *Merchants Fire Insurance Company*, made by *Edwards* to *Joseph Dilley*, the other appellee, as fraudulent under the statute of 13th *Elizabeth*, or the insolvent laws of this State.

The allegations of the bill and answers, and all the pleadings and facts of the case, are stated in the opinion of this court, delivered by his honor *Judge Frick*. The opinion of the chancellor, (JOHNSON,) delivered upon the passing of the order appealed from, is reported in 2 *Md. Chancery Decisions*, 118.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

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S. T. WALLIS for the appellants, made the following points:

1st. That there is no competent or sufficient evidence of any original agreement, on the part of *Edwards and Dilley*, to give to *Joseph Dilley*, any lien upon their stock in trade.

2nd. That even if there be any such evidence of an agreement, it does not apply to the stock in trade which was burned, and which the policy secured, and can furnish no foundation or consideration, for the alleged transfer of that policy, and its proceeds to *Joseph Dilley*, at the time and under the circumstances, when the same is alleged to have taken place.

3rd. That the agreement so attempted to be set up, was, if made at all, a fraud, or a secret equity, which cannot be recognized or enforced as against subsequent creditors.

4th. That the alleged assignment of the policy to *Joseph Dilley*, was made by *Edwards*, *post litem motam*, when he was insolvent, and was by said *Dilley* known to be so, and that it was a fraudulent preference under the insolvent laws.

5th. That the alleged assignment was void as not *bona fide*, under the statute of *Elizabeth*, and our insolvent laws, being to hinder and defraud creditors, and likewise to secure and obtain benefits for *Edwards* from *Dilley*.

6th. That the whole proceedings of *Edwards* and *Dilley*, in regard to the policy, its alleged transfer, the insolvent application of *Edwards*, and the appointment of *Dilley* as his trustee, constitute a fraud in fact, and were the result of fraudulent combination.

7th. That the answers of *Barney Dilley* and *Edwards*, are not evidence for *Joseph Dilley*.

8th. That the statements of *M. T. Evans*, in his testimony, in regard to the declarations of *Edwards*, and the conversations of that witness with, him, were inadmissible as evidence.

9th. That it is competent for chancery, under the circumstances of this case, to interfere and remove an insolvent's permanent trustee, who has become such fraudulently, pending proceedings in chancery, whereby jurisdiction has been acquired over the distribution of the insolvent's assets, and where-

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to the party so becoming trustee, is a party claiming an interest; such an appointment, so procured, being a device to oust the jurisdiction of chancery, and to acquire indirectly a right to the very possession of assets, which is the subject of the chancery controversy.

10th. That, even if chancery has no right to remove the permanent trustee of an insolvent, or to appoint another, it has unquestionable jurisdiction over him, so far as to adjudicate, as between him and the other creditors, the right to the custody and ownership of any part of the assets, which he claims to hold in his own right, and adversely to the other creditors. Such jurisdiction is a part of the recognized chancery control over all trusts and their administration, and affords to the creditors, who deny the individual right set up by the trustee, their only mode of litigating the question, the legal title to hold and to sue, being in the very party whose pretensions are impeached. In the present case it will be contended, that the jurisdiction is aided by the allegation and proof of fraud in the trustee, though it exists independently of fraud, and of any such irregularity in the appointment or conduct of the trustee, as would justify his removal by the county court, sitting in insolvency.

11th. That under the acts of Assembly, *Edwards* had no right to apply in *Allegany* county; that the proceedings there were *coram non judice*, and that *Dilley* has no standing in court, as permanent trustee of *Edwards*, his alleged appointment not being legal, or by a court of competent jurisdiction.

WM. F. FRICK and MCKAIG, for the appellees, contended:

1. That the assignment in question was not fraudulent, under the statute of 13 *Elizabeth*; but *bona fide*, and for a valuable consideration.

2. That the same was not fraudulent under our insolvent system: 1st. Because it is not proved, that *Edwards* was insolvent in fact when he made the assignment; nor that it was made by him with a view, or under an expectation, of taking the benefit of the insolvent laws. 2nd. Because it was not an undue and improper preference; it being in proof that it was

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made in compliance with an engagement to secure *Dilley*; and further, that it was involuntary, and made upon *Dilley*'s urgent request and demand.

3. That there was neither fraud, in fact or in law, in the making of the assignment by *Edwards*, or its receipt by *Dilley*; nor in any of their subsequent proceedings in the case.

4. That the assignment was not made, *post litem motam*; and that the answers and all the other evidence in the case, are sufficient and competent to prove the fact of the assignment, the time, the consideration, and the circumstances of its execution, and its validity.

5. That the answers of *Barney Dilley* and *Edwards* are evidence for *Joseph Dilley* against the complainants.

6. That the complainants have no standing in court to impeach the assignment in question; because, if in fraud of the insolvent system, the permanent trustee of the insolvent can alone avoid it.

7. That the application of *Edwards* in insolvency was regular and lawful; and the appointment of *Dilley* as his trustee, also legal and proper.

8. That the court of chancery has no jurisdiction in the appointment and removal of trustees of insolvents, the same resting with the courts of law, and the whole subject matter being governed by statute; and that it has therefore no power to remove *Dilley*, on the ground alleged, that his appointment was improper.

9. That the court of chancery cannot adjudicate the right to the policy in question, between the complainants and *Dilley*, either in his own right, or as the trustee of *Edwards*, in the present proceedings; the same having been improperly conceived, and being erroneous and defective in many respects. And that the chancellor's decree must be affirmed.

FRICK, J., delivered the opinion of this court.

Barney Dilley, the infant son, and *Benjamin R. Edwards*, the son-in-law of *Joseph Dilley*, the appellee, on the 11th of January, 1844, commenced business in the town of Cumber-

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land, under the name of *Edwards and Dilley*, and in the course of the autumn of that year, became indebted to the complainants and others, for goods purchased in the prosecution of their business.

They had originally obtained from the *Merchants Fire Insurance Company of Baltimore*, an insurance upon their stock in trade, to the amount of \$3000, and at the expiration of the policy, on the 17th of February, 1845, *Barney Dilley* having in the meantime withdrawn from the concern, upon notice to the creditors, that being a minor he was not responsible for any of the business transactions of the firm, *Edwards* procured a renewal of the policy, and continued the business in his own name.

Very soon after, on the 13th of March, a fire broke out on the premises, by which the whole stock in trade was consumed; being considerably more than was covered by the insurance; and *Edwards*, then alone interested, proceeded to *Baltimore* with a view to adjust the loss with the insurance company, and confer with his creditors.

About this period, on the 5th of April, 1845, the present complainants filed in *Baltimore* county court a bill of complaint against *Edwards and Dilley*, and the *Merchants Fire Insurance Company* alleging the insolvency of the concern, and the intention of *Edwards* to assign the policy of insurance, for the purpose of securing the claim of *Joseph Dilley*, his father-in-law, to the exclusion of the rest of his creditors, and as a proposed fraudulent preference of *Dilley*. The bill prayed for an injunction against the company, forbidding the settlement of the policy with either *Edwards and Dilley*, or *Joseph Dilley*, and for the appointment of a receiver to take possession of the effects of the concern, for the purpose of a ratable distribution of the proceeds among all the creditors.

The injunction was granted, and the case afterwards removed to the court of chancery, where upon the bill and answers, the injunction was dissolved. An appeal was taken to this court, and the chancellor's order was here affirmed on the 13th of February, 1846.

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Immediately thereupon the complainants dismissed their bill, and on the 14th of February, (the next day,) filed a second bill on the equity side of *Baltimore* county court, in which they repeat substantially the averments of the former bill, with the exception that it is now charged that the assignment had been actually executed, and *Joseph Dilley* is made a party to the bill. They again pray an injunction against the payment of the money by the insurance company, and the appointment of a receiver for the same purpose of a ratable distribution of assets, as in the preceding bill.

This injunction was also granted, and upon removal of the case to the court of Chancery after answers filed, was there dissolved. Upon an appeal to this court, the order of the chancellor was again affirmed on the second of July, 1847.

A rule for further proceedings was then had, and on the 23d of December, 1847, the complainants filed a supplemental bill against *Joseph Dilley* and the *Merchants Fire Insurance Company*.

The bill states that they had recently obtained judgments against *Edwards*, (*Barney Dilley* having defeated them on the plea of minority,) and that he had eluded their executions by removing to *Kent* county, and being there pursued, had returned to *Alleghany* county and applied for the benefit of the insolvent laws; that by collusion between *Edwards* and himself, *Joseph Dilley* had been appointed permanent trustee in fraud of complainants, who had no notice or knowledge of his appointment. That being charged with fraud, he was not a proper person to execute the trust. The bill then further charges, that any and every transfer of the policy or other assets, made by *Edwards* to *Joseph Dilley*, were made with a view and expectation on the part of *Edwards* of being and becoming an insolvent debtor, and with an intent to give to *Dilley* an undue and improper preference; and to hinder, delay, and defraud complainants of their just and lawful actions; and to receive benefit and advantage thereby, in fraud of the complainants and other creditors.

This bill prays the removal of *Joseph Dilley* from the trust.

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teeship, and also, that the assignment of the policy of insurance and other transfers to the said *Dilley*, may be declared void, and a receiver appointed to take possession of the proceeds of the policy and other assets of the concern of *Edwards and Dilley*.

The answer of *Joseph Dilley* to this supplemental bill, admits that *Edwards* applied for the benefit of the insolvent laws in *Alleghany* county, on the 14th of August, 1847; and that he was appointed permanent trustee by the court; but insists that he refused the acceptance of said trust, until pressed by his counsel to accept it, and that he has given bond for the discharge of his duty as trustee. He denies all irregularity, fraud and collusion, and insists, that if his appointment was improper, *Alleghany* county court alone has the power to remove him. He further denies that *Edwards* eluded the complainants' executions, but avers that they were served, and security given for his appearance at the return day. He denies also that the assets will be wasted in his hands, &c.; and that the assignment of the policy to him was intended to give to him an undue and improper preference over other creditors; but that it was made in compliance with the original agreement set up in his former answer, and prays that it may be incorporated as part of this answer.

Edwards, in his answer, denies the allegation of fraud, &c. He alleges that when the firm of *Edwards and Dilley* embarked in business, *Joseph Dilley* became surety for the payment of the stock of goods purchased by them, with the agreement that the goods should always be responsible for his endorsements, and that after the fire, *Joseph Dilley* insisted that the policy of insurance should be transferred as representing the goods; and that the transfer was made at the urgent request and importunity of *Joseph Dilley*, and with no view of applying for the benefit of the insolvent laws, or of giving to him an undue and improper preference, as he expected after the assignment to continue the business with the goods saved from the fire, the debts upon the books, and the aid of friends.

Barney Dilley, (discharged of all liabilities by his plea of

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minority,) was examined upon leave, and swears that it was distinctly understood that *Joseph Dilley* was to be secured in some way by the stock. That it was spoken of when the firm began, and that they promised and fully intended to secure him. And his answer to the original bill is to the same purport.

The evidence of *M. T. Evans*, proves, that in April, the end of the month, or the beginning of May, 1845, after the fire, as attorney, he was employed by *Dilley* to procure the assignment of this policy; that he urged the matter repeatedly upon *Edwards* on the ground that *Dilley* was security for the payment of the stock, and that the policy ought to stand as his indemnity in lieu of the goods. That *Edwards* did not deny that the firm were to have secured *Dilley* by the stock when witness mentioned it, but made various excuses; finally, however, he consented, and witness took the policy to the office of the company, to obtain their assent to the transfer, which was accordingly executed.

The testimony further shows that the entire stock of goods being in amount, \$4800, with the exception of about \$500 in value, were consumed by the fire; and that the debts due to the concern, amounted by the ledger to about \$500, and those on the *Tailor's* book which was destroyed in the fire, amounted to \$2000, of which it was assumed one-half, (\$1000,) might be collected.

It is further in proof that *Joseph Dilley* was liable to pay, and had paid as surety for the firm, a sum exceeding the amount of the policy, and the matter in controversy between the parties now is, the validity of this assignment from *Edwards* to *Dilley* of the policy of insurance in question.

In the discussion of this case, various points were raised upon the pleadings and exceptions taken to evidence, which so far as material to a correct understanding and decision, we shall advert to when they properly arise in the course of our examination of the case.

We are first to examine whether this assignment is void under the statute of 13th *Elizabeth*, as not *bona fide*, and made to defeat, hinder and delay creditors. The proof is abundant

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that it was made for a valuable consideration; and in the relation between these parties, which the evidence discloses, there is nothing to impeach the *bona fides* of the transfer at the time it is assumed to have been made. There is, moreover, nothing to indicate that he interposed to prevent the action of the other creditors. As a creditor himself to a large amount, he urged upon the party the payment or security of his own debt. It was his unquestionable right to do so, and to obtain the preference, which he sought from his debtor. The common law has always sanctioned this right of one creditor to obtain the payment or security of his debts to the exclusion of other creditors; and there is no such badge of fraud upon this assignment, or in the circumstances under which it was procured, as would authorize us to say that it was intended to hinder, delay or defeat the action of the other creditors of *Edwards*; more especially as it appears from the evidence that all his means were not exhausted, and he expected, with the aid of friends, to be able to continue his business.

But it is insisted, that if not void under the statute of *Elizabeth*, this assignment is an undue and improper preference under our insolvent laws, being made with a view and under an expectation of being or becoming an insolvent debtor, and with a view to this alleged preference of *Dilley*.

We are not to inquire how far the fire and destruction of the property in February, left *Edwards* in a state of actual insolvency or otherwise, except so far as it may have influenced his motives and his conduct to his creditors. It may or may not be true, that it rendered him actually insolvent; and yet the possession of the fund accruing from the policy, relieved from the complainants' injunction, might have enabled him to make some satisfactory arrangement to continue his business. Or he might reasonably have entertained hopes of resuming it with the assistance of his father-in-law, if he could secure to him the avails of the policy of insurance. The insolvency here in question, is that technical insolvency, which involves and contemplates an application for the benefit of the insolvent laws. He must intend both to apply and intend to prefer the

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particular creditor or creditors. And the guilty intent must concur in both particulars

To ascertain this intent, all the facts and circumstances surrounding the case, must be brought into view; and the court are as free to infer it from circumstances, as if it had been expressed by the party. But the inference must be a fair and justifiable one from all the facts, that leaves no doubt in the mind that the party, at the time, contemplated an application for the benefit of the insolvent laws. And it is incumbent on the complainants to establish this motive.

It is their allegation, met by the express denial of *Edwards* in his answer, that the assignment was with no view whatever to the insolvent laws, but that he expected, after the assignment, with the aid of friends, his book debts, and the goods saved from the fire, to continue his business.

In the case of *Hickley vs. the Farmers and Merchants Bank*, 5 G. & J., 378, the declaration of the insolvent upon his examination was much to the same import: "that at the time of the assignment, he had not the slightest idea of taking the benefit of the insolvent laws, but hoped to be able to settle with his creditors." The court there held: that for want of other evidence to control this declaration, the transaction must be left to its operation at common law, and being a *bona fide* assignment, and for sufficient consideration, it was sustained.

The leading fact in this cause, set up to support the charge in the bill, is the actual application of *Edwards* for the benefit of the insolvent laws, in August, 1847, more than two years after the remotest period that can be assigned for the date of the assignment, with the charge, that the intervening time had been spent by him in baffling his creditors, and postponing the application, which he must have had in view at the time of this assignment. However plausible this construction of his conduct may seem, yet it is difficult to imagine at the same time, that he would have suffered himself to be hunted and harrassed by his creditors, through this long intervening period, merely to give color to the assignment. And it is equally plausible and not improbable, that he awaited the adjustment

of his loss with the insurance company, which the complainants had protracted and defeated, in the hope of future and further aid from his father-in-law, to whom he had assigned the claim.

In this connection it is an important fact, that very few, if any of his engagements with the other creditors, had become due, when this assignment was executed. Yet he sought them out, came to *Baltimore* to explain the condition of his assets after the fire, and was at the time, engaged in an effort to compromise with them. He tells them, that he expected to carry on his business with the aid of friends. His father-in-law was the friend who had before assisted him, and whom he had promised to secure. As soon as it was ascertained that he proposed to do so, the bill is filed by complainants to enjoin him. The creditors themselves arrest the fund, put it out of his power to reach it, up to the present moment, and take from him the means and the aid, by which in making the assignment, he hoped to continue his business. It would seem, therefore, no overstrained inference to assume, that he only then first thought of this application, when the protracted controversy about the proceeds of his insurance obliterated all hopes of aid from that resource; and the executions pending over him, rendered this resort to the insolvent laws imperative.

But supposing the intention of the party here to be doubtful or equivocal, (which we do not,) there is yet another branch of the case, upon which the evidence is positive and conclusive. *Joseph Dilley* says, there was a preexisting engagement, to secure him in his endorsements for the firm; and *Barney Dilley's* answer and evidence confirm it. We do not mean to assert, that standing alone, such an equity can be made to support this assignment against subsequent creditors. But it was at least consideration enough to prompt *Dilley* urgently, to press a compliance, when the fire had rendered his security precarious. Thus connected with the other proof, it is consistent, and fortifies the testimony of *Evans*, that the assignment was the result of his urgent representations of this fact, and not voluntary on the part of *Edwards*. All the parties were in

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Baltimore at the time, the creditors as well as *Dilley*, urging the assignment of this policy. *Evans* was employed by *Dilley*, and as his attorney and agent, for this purpose alone had several interviews with *Edwards*. He says in his testimony, that *Edwards* at first refused, and that he made various evasive excuses when first applied to; that he urged the matter repeatedly, on the ground, that *Dilley* was the security for the stock of goods insured by the policy, and that the policy ought to stand as his indemnity, in lieu of the goods; that he finally prevailed and *Edwards* agreed to execute it.

We are not unmindful that the statements of *Evans*, in regard to the declarations of *Edwards*, and the conversations with him, are objected to, as declarations between themselves, of the parties to the alleged fraud, or rather between *Edwards* on the one hand, and *Evans*, who represented *Dilley* on the other. So far as these declarations are the mere narrative of a past occurrence, it must be conceded, that they cannot be received as proof of the existence of the occurrence. 1 *Greenlf.*, sec. 110. But "as far as they are concomitant with the principal act," they are part of the *res gestæ*, that explain the motives and circumstances surrounding the assignment. As agent for *Dilley* he applies to *Edwards* for an assignment of this policy, and obtains it.

The validity and legality of this act, is the very issue in the cause made by the complainants. It is assailed upon the ground, that *Edwards*, at the time, had it in contemplation to apply for the benefit of the insolvent laws; and that the assignment on his part was voluntary. And supposing the complainants to have made out a case of *prima facie* intent, how is this to be repelled but by facts and declarations accompanying the act? It is not competent and proper for *Dilley* to show what took place and what was said at the time, as part of the transaction and thus bring out the co-existing influences and motive of the assignment? How is this motive to be ascertained but from the conduct and declarations of the party at the time of the act? *Evans*, although here presents one of the parties here, has no interest in the case that can disqualify him as a

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witness; and his testimony as here restricted being admissible, he proves that the assignment was only executed after the repeated importunities and urgent persuasions of himself, as the agent of *Dilley*; and in this aspect of the case, it is beyond the reach of the complainants successfully to assail it.

It is said, however, that these conclusions can only be sustained by invoking the answers of *Barney Dilley* and *Edwards*, the insolvent; and that their declarations are not evidence for *Joseph Dilley*. That is to say, the answer of one defendant cannot be made to avail as evidence in favour of another defendant.

But why should the answers of these defendants be excluded from this inquiry? The complainants are here asking from each of these defendants, on oath, evidence as regards this alleged combination, and the intention of *Edwards* to evade the provisions of the insolvent laws; and they claim a discovery from each and all of them, upon the interrogatories submitted in their bill. They charge that *Edwards*, by reason of the fire, became insolvent, and that he contemplated to apply for the benefit of the insolvent laws.

He answers that he was not insolvent, that he did not intend so to apply, but had good reason to expect he would be able to prosecute his business, when he made the assignment in question. Can there be any sound reason or principle why they are not bound to take this, with the answers of the other defendants, as responsive to their bill; and as legal evidence, until rebutted? It is true, as was forcibly urged on the ground of mutuality, that if *Edwards* had answered that he *did*, at the time of the assignment, *intend* to apply for the benefit of the insolvent laws, *Joseph Dilley* is not to be precluded or bound by that answer. Because the rule, with but an occasional exception, (*see 4 Gill, 380.*) is well established and of long standing, that the answer of one co-defendant is not to be received against another. And why not? Because if the complainant wishes to establish a fact by the evidence of one defendant, or repel the force of his answer, he may further examine him as a witness on interrogatories to that intent; which

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will afford to the other co-defendants, an opportunity of cross-examination. And this rule is, in itself, just and reasonable, as it insures to both parties the privilege of examining the witness. It would appear somewhat singular, that if the rule is to be considered reciprocal, that it should now, for the first time, be urged in this court. In the case of *Sellman and Crawford, vs. Taylor*, 6 *G. & J.*, 323, the answer of *Ford*, the insolvent, is expressly invoked and used in favor of a co-defendant, without any objection being interposed; and we may fairly infer from the cases adduced in the course of the argument, that it has been the practice of the chancery court, hitherto unchallenged. The only *English* case referred to of *Bennett vs. Walker*, 1 *Dickens*, 130, where the answer of one defendant was read in evidence to support the plea of the other defendant, so far also sustains the doctrine; while it is proper to note at the same time, that the defendant in that case, refers to the answer of his co-defendant in support of his plea, and thus makes it his own.

The proposition is best tested by the sound and just rule of evidence, that neither party shall be charged by evidence, without an opportunity to examine the witness; but that a party who cites the witness and examines him, shall not be at liberty to reject his testimony afterwards. Here the evidence offered is the result of the complainant's own examination. The complainant may so shape his bill, as to make such use of the defendant as he pleases, in eliciting his evidence. Interrogatories are not a necessary part of his bill. He may call upon the defendant to answer generally, the matters charged in his bill. But if he proceeds by interrogatories, so far as they are responsive, he makes the answers evidence. If the defendant sets up new matter to defeat the equity, it is mere pleading and he must make it out by proof. But where his answer is responsive and he denies the complainant's averments, it is pleading coupled with evidence. And when a complainant as here, seeks a discovery and requires full answers to interrogatories from all the defendants, he cannot be allowed to say, that each answer is not evidence against him, whatever may be

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the incidental operation of the evidence upon the other defendants. The only two *American* cases cited, expressly determine, that it is evidence in favor of all the defendants. In reference to the rule, it is said in *Mills vs. Gore*, 20th Pick., 34, that "to admit the answer of one defendant to be evidence against the other, where a cross-examination could not be admitted, would give to the plaintiff an undue advantage against the manifest principles of impartial justice. The plaintiff might so frame his bill and interrogatories, as to elicit evidence from one defendant to charge another, and to exclude such matter as might discharge him. But where the answer is unfavourable to the plaintiff, and consequently operates favorably for co-defendants, the reason of the rule is not applicable." And the case of *Field vs. Holland*, in 6 Cranch, 8, is fully to the same purport: that the answer of one defendant, responsive to the bill, is evidence against the plaintiff, although the answer of one co-defendant is not testimony against another.

But assuming here the general rules upon which testimony is either received or rejected. The complainants have made *Edwards* their witness, and he has no interest in the controversy.

For if his intention to apply was expressly admitted by him, or if he conceded that the assignment was voluntary, yet such admissions could only vitiate and avoid the transfer, but would not disturb his discharge under the insolvent laws. But were it otherwise, still the complainants have made him a witness; and if his denial in his answer is received, as we have shown, it must be received, against the complainants, to contradict the allegations of their bill, how is it to be excluded, because there is a co-defendant, in whose favour the answer may and does operate, as here, consequentially?

Such a rule would give to a complainant an advantage, which it is conceived can be warranted by no just and fair principle of law or of evidence.

It is next objected against the validity of this assignment, that it was made *post litem motem*, and must be subjected to all the conditions which would attach to it, if so made after the

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filing of complainants' bill of complaint, which was upon the 5th of April 1845. The testimony of *Evans*, taken literally, certainly would indicate that it was executed after that date. But connected with other facts and circumstances in evidence, it is more than probable, that there is error in the period assigned by him, as *Edwards*, and all the parties are proved to have been in *Baltimore*, in March or April, soon after the fire, and not in the latter part of April or early in May, as stated by *Mr. Evans*. The inquiry however becomes unimportant in view of the fact, that this bill was afterwards dismissed by the complainants themselves. But in addition to this, it is manifest the proceeding was never known to *Dilley* and *Edwards*, until late in June. The bill alleging these defendants to be residents of *Allegany* county, is filed on the equity side of *Baltimore* county court; and the subpoenas made returnable in that court, on the 7th of April, (two days after) were never served. And when the injunction upon the *Fire Insurance Company*, became known to them late in June, (on the 27th,) they voluntarily appeared to the suit. There is nothing in the evidence to show that they had any earlier knowledge of these proceedings on the part of the complainants.

Whatever effect, therefore, if any, such knowledge might have had, upon a subsequent assignment of this policy, it is useless to inquire, as the testimony is conclusive, that at least, before the last mentioned date, the assignment had been executed.

But a further question has been raised here, which it becomes necessary to determine in disposing of the case. The supplemental bill filed after the application of *Edwards*, for the benefit of the insolvent laws, charges that *Joseph Dilley*, in aid of the fraud intended to be consummated by the parties, procured his own appointment as the permanent trustee of *Edwards*, under said application, and thus indirectly acquired a right to the possession of the assets; which right was and is the subject of this controversy in chancery; while at the same time the funds are not considered secure, but it is averred will be wasted in his hands, and applied to his own use and benefit. And the bill prays that *Dilley* may be removed from the ad-

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ministration of the trust, and another trustee be appointed in his place, and that to save waste and misapplication of the assets, a receiver may be appointed by the court, and the assignment in question be declared void.

That cases may occur which would warrant the interposition of a court of equity, to prevent the abuse of a trust of this character, until the proper and appropriate remedy can be applied, must be readily conceded. The allegation in this bill, that the property is not secure, and will be wasted and applied by the trustee to his own use, if supported by evidence, might furnish such a case, provided the mischief were irreparable or the consequences of such a character, as to be without relief unless in equity.

Where a trustee in two characters has the means of committing fraud as trustee and purchaser both, a court of equity will interpose and not compel the party to wait until the mischief is done. *Jeremy*, 395. But in the case before us, it is the fair and legal presumption, that the bond of the trustee executed before the proper *forum*, is adequate security against any such anticipated misfeasance, and is besides under the special control of that tribunal. In *1st Story's Eq. Jur.*, sec. 70, it is said: "When we depart from matters of fraud, accident, mistake and account, as the foundation of a suit, in equity it is difficult to ascertain the boundary, where the right of a court of equity to entertain a bill for relief, as consequent upon the jurisdiction for discovery, begins and when it ends." And it may be safely assumed, that where there is any adequate remedy pointed out by the law, courts of equity will not interpose; more especially, where the party sought to be affected by the proceeding, derives his powers under a special jurisdiction, and is made responsible to that jurisdiction for the exercise of his trust. *Kennedy vs. Fowler*, 8 *G. & J.*, 348. Nor is this case supposed by counsel, of a conflict of jurisdiction, where by reason of the relief prayed against the alleged fraudulent assignment, the jurisdiction first attached in equity. The parties have instituted no adverse proceedings here, or in any other *forum*. To have done so, in relation to the same subject matter,

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after the filing of the bill in this case, might have given some countenance to the objection.

But the parties here are passive and *Joseph Dilley* is throughout a defendant. His appointment as trustee is a legal incident and consequence of the application of *Edwards*, for the benefit of the insolvent laws; and against him in that character, the complainants have filed their supplemental bill. But can that bill draw with it the administration of this trust in chancery, where an act of Assembly, expressly delegates to another *forum* the appointment, control and removal of the trustee? The insolvent laws vest the whole property of the insolvent, in the trustee appointed by the court for the benefit of all the creditors.

If there be any conflict of rights between him and the creditors, that court has ample powers if necessary to remove him. At the same it is not so clear to us, that any such necessity exists, when *Allegany* county court has full authority to direct an account of the trust, and the assets of the estate, to be stated before them, and to determine the respective rights of the parties under this assignment. At all events the court of chancery has no jurisdiction in the appointment and removal of trustees of insolvent debtors, the whole subject being regulated by statutes and resting with the courts of law. And even if the appointment be improper or injudicious, the right to remove him by a court of equity, could not be assumed without necessarily drawing with it, the whole administration of the insolvent's assets. And that is confided exclusively to the courts of law. The objection that the complainants are turned over to another and more circuitous remedy, (if it be so,) can have no weight in determining the question. The proceeding before *Allegany* county court, before suggested, has been open to them in that *forum* from the day of his appointment. It is enough that the remedy there is ample and adequate, and we cannot regard this as a case where equity having possession of the general subject can interpose its aid by disposing of the whole matter, and thus prevent delay or multiplicity of suits. *Kennedy vs. Fowler*, 8 G. & J., 340.

Finally, it is urged that under the several acts of Assembly

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relating to insolvents, *Edwards* not being a resident, had no right to apply in *Allegany* county court; and that the proceedings there were *coram non judice*, and therefore *Joseph Dilley* has no standing in court as trustee of *Edwards*, the appointment, not being legal or by a court of competent jurisdiction. His resort to that unauthorized *forum*, is adduced as another fact in the alleged fraudulent combination.

There is testimony in the case, and one of the answers also admits, that *Edwards* was a resident of *Kent* county. Yet upon the face of the insolvent's papers it appears, that he is styled a resident of *Allegany* county, and throughout the proceedings upon his application he is so treated. See the case of *Barney vs. Patterson*, 6 *H. & J.*, 182. Are we at liberty to discard this record and resort to the testimony under the present proceeding, and upon that, pronounce the action of *Allegany* county court illegal and void? On the contrary the law presumes this authority to have been rightfully exercised. More especially when it comes incidentally into the case as here, it cannot be questioned. If any principle is settled, it is, that the authority of a court of competent jurisdiction, when coming incidentally in question, "is conclusive of the matter decided, and cannot be impeached on the ground of *informality* in the proceedings, or mistake or error in the matter on which they have adjudicated." *Raborg vs. Hammond*, 2 *H. & G.*, 50.

On the subject of trusts, administrations, &c., when the question of appointment arises incidentally in other courts, it is not competent there to inquire, whether rightfully appointed or not. And it becomes then unnecessary here to decide the correlative question, whether a party could or could not apply for the benefit of the insolvent laws, in any other county, than the one in which he resides; which must depend upon the provisions and the true construction of the acts themselves. And upon this construction the occasion is not now presented to express an opinion. In every view of the case therefore, the decree of the chancellor must be affirmed.

DECREE AFFIRMED.

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BENJAMIN CUSHWA, vs. JOHN S. CUSHWA, ET AL., LESSEE.—*December* 1850.

The docket entries in an ejectment suit, showed that the defendant, the tenant in possession, appeared at the imparlance term, and took defence on warrant under the plea of not guilty, on which issue was joined; and immediately thereupon, without any new declaration against the defendant, followed a judgment, "That plaintiff recover against the defendant his term, and the sum of \$500, his damages claimed in his declaration." Two terms afterwards the plaintiff applied to the court to amend these entries, by striking out the words, "plea not guilty, and defence on warrant," upon the ground that they were interlined by the clerk after the rendition of the judgment. The court ordered the words to be stricken out, and the judgment to stand as rendered for want of a plea; thus making it a judgment upon *nil dicit*. HELD, that this judgment was erroneous in form and substance, both as it originally stood on the docket, and as corrected by the court.

Admitting the absence of a plea, all the court could do, was to adjudge the title to the plaintiff: the damages must be ascertained by the verdict of a jury.

In an action of ejectment where damages are laid in the declaration, the plaintiff, before he can have a judgment upon *nil dicit*, establishing his title, must release his damages.

The judgment upon *nil dicit*, can only be against the casual ejector, and this judgment being against the tenant in possession, is for this reason erroneous.

After entering into the consent rule in ejectment, the plaintiff, before he can enter a default, must serve a new or altered declaration.

Admitting the plea and issue to be in, the judgment cannot stand, because it had no verdict to sustain it.

It is competent for this court to correct these proceedings, upon an appeal from the judgment of the court below, ordering the clerk to strike out the entry of the plea, and suffer the judgment to stand "*for want of a plea*." The point upon which the judgment is objected to, is distinctly indicated by the rule and order of the court.

The act of 1825, chap. 117, does not apply to demurrers, or motions in arrest of judgment, because these objections being to the pleadings, the whole record is before this court, and the whole is examined to arrive at the proper objections.

APPEAL from *Washington* county court.

This appeal was taken by the appellant, (the defendant below,) from a judgment of the county court, (MARSHALL, A. J.,) in an ejectment case. The court passed an order upon ap-

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plication of the plaintiff, directing the clerk to strike out the docket entry of “plea of not guilty, and defence on warrant,” and to suffer the judgment, “that the plaintiff recover against the defendant his term, and the sum of \$500, his damages laid in his declaration,” which had been previously rendered in the cause, “to stand for want of a plea.”

The pleadings and facts of the case are stated in the opinion of this court.

The cause was argued before MAGRUDER, MARTIN and FRICK, J.

By F. A. SCHLEY for the appellant, and
By PRICE for the appellee.

FRICK J., delivered the opinion of this court.

This case is before us upon appeal from the proceedings of *Washington* county court in an action of ejectment, the record of which shows:

That the action was instituted at March term, 1846, by the usual proceedings against the casual ejector, the copy of which was duly served upon *Benjamin Cushwa* the tenant in possession, who at the same term appeared, entered into the consent rule, and the case was continued to the next term of the court (the 3d Monday of November,) with leave to ascertain his defence, in the usual form.

At the imparlance day, *Cushwa* appeared, and takes defence on warrant under the plea of not guilty, upon which the issue is joined; and hereupon judgment follows, “that the plaintiff recover against said *Cushwa* his term aforesaid, and the sum of \$500, his damages laid in the declaration.”

In this state of the record, at the second term of the court after the judgment, the plaintiff applied for a rule upon the defendant to show cause why the docket entries should not be corrected by striking out the words “plea not guilty, and defence on warrant;” thus to render it a judgment upon *nil dicit*, for want of a plea, which the plaintiff insists was the true state of the docket, when the judgment was rendered by the court.

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A number of affidavits are produced and filed in support of the rule, to show that the plea and defence in the case were interlined and inserted by the clerk of the court after the rendition of the judgment.

On the other hand, evidence entitled to equal consideration is adduced in denial, which if it were in any view material, might render it difficult to determine the preponderance.

The fact is admitted in all of them, that the plea and defence were, at one stage of the cause tendered orally, and at another in writing. The controversy on this point, has only regard to time, and so far as it is of any importance in explanation of the action of the court below, and the views of counsel, it is conceded by all, that the oral proffer of the plea and defence, preceded the entry of the judgment.

It is but justice to assume, that on this fact, was predicated the action of the court. They decided that the defence was not taken in time, and that the defendant was restricted to the general denial. The defendant insisted upon his whole defence, and the court as for want of a plea, directed the judgment to be entered upon the *nil dicit*.

The entry or interlineation of the plea was pronounced a misprision of the clerk, the rule made absolute, and it was adjudged that the clerk strike out the entry of the plea of not guilty and defence on warrant, and suffer the judgment to stand as rendered for want of a plea.

It is no part of our inquiry, how far the court was right or otherwise in pronouncing this a clerical error, and as such directing it to be erased. Considering it unimportant in our view of the case, it further relieves us from a critical examination of the affidavits. We concede to the court this control over its own records; and assuming the propriety, propose to inquire into the effect of, the erasure. It is then made to present the judgment of the court upon a state of the pleadings, which for manifest error, cannot stand. It is erroneous both in form and in substance. At the same time the court direct the judgment to be entered against *Cushwa*, they undertake to assess the damages to the extent of \$500. It need scarcely be said, that this

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was the province of a jury, not in this, but more properly in a separate action for the *mesne* profits predicated upon the judgment in favor of the plaintiff. The damages are in their nature uncertain, and must be established by testimony. And admitting the absence of a plea, the utmost which the court could do, was to adjudge the legal title to the plaintiff. The legal judgment can only be, that the party should recover his term, certainly no more. And where damages are laid in the declaration, before the plaintiff could claim a judgment, simply to establish his title, without the intervention of a jury, he would be required to release the damages, to make the judgment available to him in this form. In this particular, the law and practice of the State is uniform See *Harr. Ent.* 116, 117.

And this is not the only error in this proceeding. This one defect in the judgment naturally suggests another equally apparent on the face of the record. The judgment upon *nil dicit* could only be against the casual ejector. Here the judgment is against *Cushwa*, the tenant in possession.

The record recites, that *Cushwa* comes into court by his attorneys; whereupon it is ruled, that he be admitted in place of the casual ejector, that he immediately receive a declaration and plead the general issue, and confess lease, entry and ouster; or in default thereof, that judgment be entered against the now defendant, *John Doe*, the casual ejector. The court in their action, determine, that the default exists upon *nil dicit*; and yet the judgment expressly records, that the plaintiff “shall recover his term against the said *Benjamin Cushwa*.” As well might it be entered against a stranger to the whole proceeding.

At the same time, it can scarcely be said strictly, that there was any default, where “he was immediately to receive a new declaration,” and plead thereto, when no such declaration appears by the record to have been tendered. After entering into the consent rule in ejectment, the plaintiff, before he can enter a default, is to serve a new or altered declaration. *Adams on Ejectment*, 241, note 1. The defendant was not competent to plead to a declaration, which was not against him, but against

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the casual ejector. In point of fact, therefore, he was here required to plead without a declaration. And from the depositions, it would appear, that when he offered so to plead, and take defence on warrant, the defence was ruled out by the court as *tarde*, while the record informs us that leave had been given until the 3d Monday in November, to ascertain his defence. And at the same time, and for anything to the contrary in the record, on the same day, judgment is recorded against him for want of a plea.

It was strongly urged in argument, that the proof offered, did not warrant the court in cancelling the pleas. We have waived the inquiry, especially as a denial of the right would place the judgment in no better position. The case would then be left at issue, and the judgment would stand as the act of the court, without the intervention of a jury, and actual damages awarded without a verdict. It would thus present a legal contradiction still more objectionable. In any point of view, it cannot stand a legal test for a moment. It is no judgment upon *nil dicit*, because not against the casual ejector. It is no judgment upon the pleas and issue, because it has no verdict to sustain it. It is in fact, a naked, unsupported judgment of the court, against *Benjamin Cushwa*.

The question now is, can we correct these proceedings? With all the defects apparent upon the record before us, lying upon the surface of the case, the right here to interpose, is denied by the appellee's counsel, because it is said, the point or question upon which this judgment is objected to, does not appear to have been raised in the county court, as the act of 1825, ch. 117, prescribes.

We are at a loss to conceive how the point could be more distinctly stated, than the prayer and the rule itself indicates.

“The plaintiffs, by their counsel, pray, upon the facts and circumstances stated in the affidavits herewith filed, which are to be taken and received as part hereof, in the same manner as if they were herein repeated, to rule the defendant to show cause why the plea of not guilty and defence on warrant, should not be struck out, &c., as a clerical error.” And the

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affidavits, moreover, fully state the grounds and reasons in support of the prayer.

We have hereupon the judgment of the court: that “having carefully examined the evidence filed, and heard the counsel for the parties, they order and adjudge that the clerk strike out the entry of the plea of not guilty, and defence on warrant; and suffer the judgment to stand as rendered for *want of a plea.*”

And thereupon, the defendant, by his counsel, prays an appeal from the judgment aforesaid, so as aforesaid rendered.

Here then, an alleged defect in the original judgment is specifically referred to in the rule to show cause, and the grounds and reasons of the prayer are further set forth in affidavits, all of which are made part of the case presented to the court. And it was said in argument, and may therefore be assumed here as a *concessum* of the counsel for the appellants, that if the defendant had further moved the court to strike out this judgment, the refusal of the court to do so, would then have opened the grounds upon which the judgment was made to rest, and presented a proper case for appeal. We cannot perceive how this would more distinctly indicate the point in issue, than the rule itself does, and the order of the court directing the judgment to stand; with the express reason of the court assigned: “*to stand for want of a plea.*” And, indeed, if the motion had been made by defendant’s counsel as suggested, the appeal would still be properly from the judgment of the court, and not the refusal to strike out; and nothing would be attained by superadding another motion. The case of *Washington vs. Hodgskin*, in 12 G. & J., at p. 355, will serve as an illustration. Upon the motion of the plaintiff there pending, for a judgment in attachment, the court permitted the garnishee to appear and overruled the motion for a judgment. Upon his motion, the court quashed the attachment, and the plaintiff moved for a re-hearing, and that the judgment be struck out, which motion the court also overruled; and the plaintiff prayed an appeal from the judgment. Upon the appeal here, this court say: “It was properly taken from the judgment of

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the court below, quashing the attachment, and not from the refusal of the court to grant a re-hearing, &c.”

It has been heretofore said by this court, in the case of the *Charlotte Hall School vs. Greenwell*, 4 G. & J., 407, in reference to this act of 1825, that it does not apply to demurrers or motions in arrest of judgment. And the reason given is, that of themselves they disclose that the objection is to the pleadings; and by this objection “the whole record is brought to the view of the court.” No particular defect in the pleadings, no particular grounds on which the verdict is impeached, are presented in such case, but the court examine the whole of the pleadings and issues, to arrive at the proper objection.

With how much more reason is it the duty of the court here to entertain this appeal? The application to strike out the pleas directs the attention of the court below to the defect in the judgment. They were called upon to correct an alleged clerical error, which stultified the judgment given by the court. The entries clearly showed a judgment rendered by default, when there were issues in the cause for a jury. Does this “appear to have been a point presented to the county court, and upon which that court rendered judgment,” in the language of the act? We have the answer in their action upon the rule. For they direct the pleas to be erased, and order the judgment to *stand* “for want of a plea;” thus determining that this judgment on *nil dicit* was properly rendered against *Cushwa*. Is it not manifest, leaving out of view even the affidavits which support the case, that they had before them the precise point now under review, that is, the validity and legality of this judgment? It was shown to them that the state of the pleadings would not support the judgment as disclosed by the record. To enable it “to stand,” the pleas must be removed; and by directing the clerk to erase them, they change the whole legal form and effect of the judgment, and the entire character of the record. All this is the result of the order of the court, *determining upon the effect of these pleas*, and the relation in which they stand to the whole, as constituting a legal record of a judgment. To this result they arrive, in entertaining the precise objection pre-

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sented to them by the application of the plaintiff's counsel; correcting the record in the very particular and point presented to them. The question was whether these pleas were rightfully in the entries or not; and the interposition of the court changing the form of the judgment, indicates the point distinctly before them, and determined by them; and affords to this court the right and the means to review their proceedings, and to pronounce this judgment of the county court in any and every view defective and unsupported by the pleadings.

JUDGMENT REVERSED AND PROCEDENDO.

CHRISTOPHER RODEMER, vs. CHRISTIAN E. DETMOLD, GARNISHEE OF CLEMENT REDLER, ET. AL.—*Dcc.* 1850.

The 2nd section of the act of 1825, ch. 114, gives no authority to clerks of county courts, to issue attachments on judgments of justices of the peace, unless the plaintiff produces the original judgment or a copy thereof under the hand and seal of the justice who rendered the same.

APPEAL from *Allegany* county court.

This was an *attachment* issued by the clerk of *Allegany* county court, at the instance of the appellant (the plaintiff below) upon the transcript of a judgment of a justice of the peace, taken from the justice's docket filed in the clerk's office of said county.

The garnishee appeared and moved the court to quash the attachment because it was issued by the clerk, without the original judgment or a copy thereof under the hand and seal of the justice who rendered the same, being produced to him by the plaintiff. The plaintiff then asked the court to amend the attachment so as to show that he produced the original judgment, which he avers was done by him. This amendment was re-

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sisted by the defendant. 1st. Because the court has no power to make such alteration in the writ. 2nd. Because the affidavit of the plaintiff, to his petition, was not sufficient to authorise the alteration asked for. 3d. Because it is not an amendment of the process or proceedings in said cause, as respects any defect or imperfection therein. And 4th. Because the alteration would substitute a fact which did not exist when the attachment issued. The last objection was supported by affidavits of the clerk and deputy clerk, and the court overruled the motion to amend and quashed the attachment. From this judgment the plaintiff appealed.

The cause was argued before SPENCE, MAGRUDER, and FRICK, J.

By M. T. EVANS for the appellant, and
By GEO. A. PEARRE, for the appellee.

SPENCE, J., delivered the opinion of this court.

There is no error in the judgment of the court below in this cause.

The act of 1825, ch. 114, sec. 2, confers no authority or power upon the clerks of the county courts, to issue writs of attachments upon the application of the plaintiff or plaintiffs, in any judgment rendered by a justice of the peace, unless they produce the original judgment, or a copy thereof, under the hand and seal of the justice who rendered the same.

The production of the original judgment, or a copy under seal, in such cases, is indispensable to give the court jurisdiction of the subject.

JUDGMENT AFFIRMED.

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WILLIAM M. MARSHALL, vs. JOHN HANEY.—December 1851.

Evidence of what a witness said under oath in a former trial, is admissible in a subsequent suit, between the same parties when the witness is dead, or out of the jurisdiction of the court, or cannot be found after diligent search, or is insane, or sick, or unable to testify, or is kept away by the adverse party after summons.

In an action of covenant, where the plaintiff in his declaration assigns particular breaches, the defendant cannot plead general performance, he must meet the allegations of the particular breaches.

Where an objection is taken to the admissibility of evidence generally, this court is not prevented by the act of 1825, ch. 117, from examining the pleadings, because the admissibility of the evidence is entirely dependent upon them.

Evidence of the contents of receipts, given at the land office, to parties who take up lands, is not admissible, though the witness proved that it was the custom of said office, to require such receipts to be delivered up, when patents are issued.

The non-production of written instruments, must be accounted for, before evidence of their contents can be given.

The acceptance of a deed by the covenantee, in discharge of a covenant to convey, will, in the absence of mistake, misrepresentation, or fraud, discharge the covenantor, though the land conveyed be not the identical land mentioned in the covenant.

The conveyance by the covenantee, of the same land to a third party, is, in the absence of evidence, of mistake, misrepresentation, or fraud, evidence of his acceptance of the deed conveying this land to him from the covenantor, under the covenant.

A party agreed to convey certain lands, in part payment for the purchase money of other lands; in an action for the breach of this agreement. **Held:** That the time at which the breach occurred, was the period at which the value of the lands should be estimated, in assessing damages.

APPEAL from *Washington* county court.

This was an action of *covenant* brought by the appellee against the appellant, upon the agreement referred to and set out in the opinion of this court.

The declaration after averring performance of the agreement on the part of the plaintiff, charges three breaches by defendant. 1st. That he had refused to give possession or convey the *Missouri* lands to plaintiffs. 2nd. That he had conveyed two hundred acres, part of said lands, to one *Samuel Zellers*,

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in breach of the contract; and 3rd. That he had refused to pay the \$5300 for the *Alleghany* lands, according to the terms of the agreement. The rest of the pleadings are stated in the opinion.

At the first trial, the jury rendered a verdict for the plaintiff, and assessed the damages at \$2250; the court, (MARTIN, C. J., and WEISEL, A. J.,) granted a new trial, because the damages were excessive. The new trial was then had *under the same state of the pleadings*, and various exceptions were taken by the defendant.

1ST EXCEPTION. The plaintiff after offering in evidence the agreement, and admitting the money payments by the defendant, offered a deed of the *Alleghany* lands, which was admitted to have been accepted by defendant as a performance of the plaintiff's covenant to convey, and rested his case. The defendant then offered two deeds, one executed by defendant and wife, 14th of September, 1844, conveying certain lands in *Missouri* to *Haney*, the plaintiff; the other executed by *Haney* and wife, dated 12th of March, 1845, conveying the same lands to one *Chaney*. The handwritings of the several grantors being proved, the defendant then offered the notice to produce these deeds which had been duly served upon plaintiff's counsel, and then proved by *J. D. Roman, Esq.*, that these deeds were produced in court at the former trial by *Mr. Spencer*, the plaintiff's then counsel. The plaintiff then offered to prove by said *Roman* the facts stated in the opinion of this court on this exception, and to the overruling of his objection to the admissibility of this evidence, the defendant excepted.

2ND EXCEPTION. The defendant offered certain patents, (some original, and duly authenticated copies of others,) from the government to *Rench* and *Zellers* for certain lands in *Missouri*, and certain agreements between *Rench* and *Zellers* and *Marshall*, for a sale of these lands to the latter. To this evidence, the plaintiff objected, urging that the patents and conveyances should be produced, or their absence accounted for before any subordinate evidence could be received: that said papers were not referred to in the agreement sued on, and it

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did not appear that *Haney* had any knowledge of their existence. The court sustained this objection, and defendant excepted.

3RD EXCEPTION. The defendant then, in connection with the above agreements, offered to prove by *Zellers* that witness was authorised by *Rench*, as his agent, to sell, and did, as agent, sell to *Marshall* the lands patented to *Rench*, together with those patented to himself. By *Judge Weisel*, that said agreements are in his handwriting, and prepared by him at the request of the parties thereto, and have remained in his possession to the present day. The court sustained the plaintiff's objection to this evidence, and defendant excepted.

4TH EXCEPTION. The defendant then, for the purpose of showing sale of the lands from *Rench* and *Zellers* to *Marshall*, offered to prove by *Zellers* that when witness called on *Judge Weisel* to prepare said agreements, he had duplicate receipts from the land office at *Palmyra, Missouri*, obtained by him and *Rench*, at the time said lands were taken up by them, which receipts he delivered to said *Weisel*. By *Judge Weisel*, that he copied the description of said lands in said agreements, from these receipts, and then delivered the same to *Marshall*, And by *Zellers*, that it was the custom of the general land office to require the receipts to be delivered up when patents are obtained for the lands. The plaintiff objected to this evidence of their contents, because the receipts themselves were not produced, which objection the court sustained, and defendant excepted.

5TH EXCEPTION. The defendant then prayed the court to instruct the jury, that the acceptance by *Haney* of the deed from *Marshall*, for the 320 acres of *Missouri* lands, mentioned in the articles of agreement on which suit is brought, was *prima facie* a full performance of *Marshall's* covenant to convey, which by such acceptance became discharged, and the execution by *Haney*, of a deed for the same lands to *Chaney*, is an admission of his acceptance of the deed from *Marshall*, and the plaintiff is not entitled to recover. But the court rejected this prayer, upon the ground that there was no evidence from

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which the jury could find, that the land mentioned in the deed from *Marshall* to *Haney*, was the land mentioned in the articles of agreement in suit. Defendant excepted.

6TH EXCEPTION. The plaintiff then offered the agreement sued on as evidence, though not conclusive, of the damages he is entitled to recover upon the issues joined. The defendant objected because the agreement does not speak of the value of the *Missouri* lands, at the time of the breach, and such valuation was not intended by the parties as stipulated damages in the event of a breach. But the court overruled the objection, and permitted the agreement to be offered under both breaches, being of opinion, that it was an element of proof upon the first breach to show in connection with other facts the value of the land in 1844, and on the second, as evidence from which the jury may find that \$2100 of the purchase money was due. Defendant excepted.

7TH EXCEPTION. Defendant then offered a deed from *Zellers* to *Marshall*, dated 10th of September 1842, conveying 320 acres of land in *Clarke* county, *Missouri*, and proved by *Zellers* that this was for the 320 acres taken up and patented by witness as aforesaid, and prayed the court to instruct the jury that in estimating damages, they must deduct the value of the 120 acres of land conveyed from *Marshall* to *Haney*, being a part of the land, which defendant was under covenant to convey to the plaintiff. But the court rejected the prayer as tendered, and added the qualification that the jury must find that when *Haney* accepted said deed he had knowledge that it contained only 120 acres of the land covered by the agreement sued on in this case. Defendant excepted to this qualification.

8TH EXCEPTION. Defendant for the purpose of reducing the damages on both breaches, offered to prove by *Zellers*, that in 1845, the *Missouri* land referred to would not have sold for \$1.25 per acre. The court rejected this evidence upon the second breach, but admitted it on the first. Defendant excepted.

9TH EXCEPTION. This exception was taken by defendant

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to the court's refusal to grant his prayer, that *Haney's* execution of the deed to *Chaney*, is an admission that he accepted the deed conveying the same land to him by *Marshall*, and he is estopped from denying that he knew and understood what fractions of sections were conveyed by said deed of *Marshall* to him.

10TH EXCEPTION. The defendant prayed the court to instruct the jury that the plaintiff is not entitled to recover under the 2nd breach, interest on the \$2100, for a date prior to the 1st of April 1844, which the court rejected and instructed the jury, that they might in their discretion allow interest from the 1st of April 1842. Defendant excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before SPENCE, MAGRUDER and FRICK, J.

By PRICE and ROMAN for the appellant, and

By J. SPENCER, for the appellee.

SPENCE, J., delivered the opinion of this court.

This action was brought by *Haney* against *Marshall*, for an alleged breach of an agreement, entered into between them, on the 23rd day of December, 1842. By this agreement, *Haney*, on his part, agreed to bargain and sell to *Marshall*, in fee-simple, one hundred and twenty-five acres of land in *Washington* county, *Maryland*; and *Marshall* agreed to pay for said land, five thousand, three hundred dollars, to be paid in the manner therein stated, "that is to say, *Marshall* agrees and binds himself to convey to said *Haney*, his heirs and assigns, in fee-simple, by a good and sufficient deed of bargain and sale, clear of all incumbrances, three hundred and twenty acres of land, situate, lying and being in *Clark* county, and State of *Missouri*, being the same land which was purchased from the government by a certain *Samuel Zellers* and *John A. Rench*, and by the said *Rench* and *Zellers* sold to said *Marshall*; the said three hundred and twenty acres of land in *Missouri*, is valued at twenty-one hundred dollars, and the said

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Haney agrees to receive said three hundred and twenty acres of *Missouri* land, in part payment of the said one hundred and twenty-five acres of land, at the price of twenty-one hundred dollars;" and *Marshall*, on his part agreed to pay *Haney* the balance of the five thousand, three hundred dollars, as follows: the sum of fifteen hundred dollars, on the first day of April 1842; the sum of eight hundred and fifty dollars, on the first day of April 1843; and the sum of eight hundred and fifty dollars, on the first day of April 1844. It was further stipulated, between the parties, that upon the payment of the whole of the above purchase money, *Haney* was to convey the one hundred and twenty-five acres of land to *Marshall*, and *Marshall* agreed to convey the said three hundred and twenty acres of *Missouri* land, at the same time he, the said *Marshall*, received the deed from *Haney*, for the one hundred and twenty-five acres of land as aforesaid.

The plaintiff, in his declaration, assigned three distinct breaches of this covenant; to which declaration, the defendant pleaded general performance, which plea concludes with a verification, &c., and in this state of the pleadings a jury was sworn to try the issue.

We take occasion here to say, that the pleadings in this cause, have given us more embarrassment, and investigation to dispose of them, than all the legal propositions would have done, under the usual, and proper form of pleading.

At the trial of this cause the defendant proved by *J. D. Roman, Esq.*, "that certain deeds were produced in court, at the last term, by *Mr. Spencer*, the plaintiff's counsel, during the former trial of this case. And the plaintiff then offered to prove by said witness, that during the said former trial, and sometime after the said deeds were offered in evidence, and after the intervention of other proceedings, the said *Spencer* was sworn in behalf of the plaintiff in the cause, and testified, that he had found said deeds among the papers of *D. G. Yost*, deceased, after the death of said *Yost*, when looking for the agreement, upon which this suit was brought." To which evidence of *J. D. Roman* thus offered by the

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plaintiff, the defendant by his counsel objected, but the court overruled the objection, and admitted the evidence to go to the jury, and the defendant excepted.

We think the court erred in overruling the defendant's objection and allowing this evidence to the jury, and shall disprove of this exception by a single reference to *Greenleaf's* work on evidence, *vol. 1, sec. 163*, where he says, "the chief reasons for the exclusion of hearsay evidence, are the want of the sanction of an oath, and of any opportunity to cross-examine the witness. But, where the testimony was given under oath, in a judicial proceeding in which the adverse litigant was a party, and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth, being no longer wanting, the testimony so given is admitted, after the decease of the witness in any subsequent suit between the same parties. It is also received, if the witness though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick, or unable to testify, or has been summoned, but appears to have been kept away by the adverse party." If *Mr. Spencer* the witness, was in court the plaintiff if he wished his testimony to go to the jury, should have had him sworn and examined.

In the further progress of the trial, the defendant proposed to offer in evidence to the jury certain patents and agreements between *Wm. M. Marshall* and *Samuel Zellers* and *Samuel Zellers* and *John A. Rench*, to the admissibility of which patents and agreements the plaintiff by his counsel objected and the court sustained the objection. The question of the admissibility of this evidence could only be determined by ascertaining the fact, whether they were competent and admissible to prove the issue. The patents were not inadmissible for the reason assigned in the objection made to them by the plaintiff's counsel. Several of them were original patents, and the others were copies properly authenticated by the proper officer. *Vide* the act of Assembly, 1785, ch. 46, sec. 7; and 5 *Peters*, 233. The agreements offered with the patents, seem to have been the originals, and therefore were not obnoxious to this objection.

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But if these instruments were not inadmissible for the reasons assigned by the plaintiffs, were they so for any reason? We think they were not admissible. We have before said this question must be determined by ascertaining whether the evidence was competent and pertinent to prove the issue.

Greenleaf in his work on evidence vol. 1, sec. 51 says. "The pleadings at common law, are composed of the written allegations of the parties, terminating in a single proposition distinctly affirmed on one side, and denied on the other, and called the issue." And it is an established rule, which we state as the first rule governing in the production of evidence, that the evidence offered must correspond with the allegations, and be confined to the point in issue." In order then, to determine the competency and admissibility of these patents and agreements, we must ascertain whether there be any issue in this case, and if there be, what that issue is. We have before stated that the plaintiff had assigned three special breaches of the defendant's covenant, to which declaration, the defendant pleaded general performance with a verification, &c.

This cannot be done. The defendant was bound to meet the allegation of the particular breaches. Issue cannot be taken, on a general plea of performance, and the plaintiff, if driven to reply, would be obliged to repeat his declaration.

"An issue is a single, certain, and material point, arising out of the pleadings of the parties and generally should be made up of an affirmative and negative." The breaches assigned in this declaration are special, the plea is one of general performance. 5th *Peters*, 148, *Simonton vs. Winter and Bowman*.

There being no issue joined in this case, the conclusion is irresistible, that evidence could not be competent and admissible to go to the jury, to prove that which was not framed by the pleadings.

Nor is this court concluded by the act of 1825, ch. 117, from the consideration of this question. In the case of *Leopard, vs. The Chcs. & Ohio Canal Company*, 1 *Gill*, 228, when reasoning upon the operation and effect of this act, the learned judge says "where an objection is made to the admissibility

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of evidence offered generally in a trial before a jury, then the attention of the court is necessarily called to the pleadings in the cause; the admissibility of the evidence being entirely dependent on them, the court cannot judge of its pertinence or materiality, but by their inspection'' and he assimilates an objection to evidence in this particular to a demurrer or motion in arrest of judgment. We think, therefore, the court did not err by rejecting this evidence.

The court did not err in rejecting the evidence of *Zellers* in the third bill of exceptions. Parol evidence was not competent to prove the agency and sale of land. If an issue had been joined on the second breach assigned in the plaintiff's declaration, we incline to the opinion that judge *Weisel's* evidence would have been admissible, but under the pleadings in the cause the court properly rejected it.

The court committed no error by rejecting the evidence of the contents of the receipts mentioned in the fourth exception. The non-production of a written instrument, must be accounted for before evidence of its contents can be given. It is true, in this case, that *Zellers* testified to the custom of the land office, requiring receipts to be given up, but there was no evidence that these receipts had been surrendered up at the land office. And again, this evidence was properly rejected, because it was not pertinent and competent to any issue in the cause.

If issue had been joined on the second breach assigned in the plaintiff's declaration, we think the court should not have rejected the defendant's prayer in the fifth exception. A deed had been executed by *Marshall* to *Haney*, for lands in *Clarke* county, *Missouri*, and if the lands conveyed by *Marshall's* deed, were not the identical lands named and described in the agreement between *Marshall* and *Haney*, yet, in the absence of evidence of mistake, misrepresentation or fraud, if *Haney* accepted this conveyance from *Marshall*, in discharge of this stipulation in the agreement of the 23rd of December, 1842, it did discharge him.

It is also the opinion of this court, that in the absence of evidence of mistake, misrepresentation, or fraud, the convey-

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ance from *Haney* to *Chaney* of the same lands which were conveyed from *Marshall* to *Haney*, was a fact which the court might have instructed the jury was evidence that *Haney* had accepted the deed from *Marshall* under his agreement of the 23rd of December, 1842, but as we have before said, the court were not wrong in refusing this instruction under the pleadings in this cause.

We think the court erred in permitting the evidence offered by the plaintiff in the sixth exception, to go to the jury, because it was not competent and admissible to prove any issue in the cause. Under a correct state of pleading, it might have been evidence to aid the jury in the assessment of damages, but on the breach only, which was assigned for the non-conveyance of the 320 acres of land in *Clarke* county *Missouri*.

We think the court were correct in rejecting the evidence in the seventh section, for the reasons given on the second exception, but wrong in the qualification which they made in their instruction.

The court did not err in the eighth exception, for the reason given on the second exception, but if issue had been joined on the plaintiff's second breach, the time at which the breach of the agreement occurred, was the point of time at which the value of the *Missouri* land should have been estimated. *Vide* 1 *Brockenbrough's Rep.*, 218. *Letcher and Arnold, vs. Woodson*, (note to the opinion of the court.) 6 *Wheat. Rep.*, 109, *Hopkins vs. Lee*. 6 *Har. and John.*, 297, *Cannell vs. M'Clean*. If the agreement was admissible to prove the value of the land in 1842, why should not the evidence of *Zellers* be admissible to prove it in 1845?

The court erred in the ninth exception, for the reasons assigned on the fifth exception.

The court, by rejecting the prayer of the defendant in the 10th exception, did not err; there was no issue joined on the second, or any other breach. If the interest forms a part of the damages which the plaintiff was to recover, and the value of the land at the time of the breach was to form the measure of damages, it is difficult to conceive on what principles the

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jury were to allow interest from a period anterior to the breach. The judgment is reversed on the first, sixth and ninth exceptions, and procedendo awarded.

JUDGMENT REVERSED, AND
PROCEDENDO AWARDED.

JOHN SPESSARD AND OTHERS, vs. JACOB ROHRER AND OTHERS' LESSEE.

A party conveyed lands to a grantee, without adding the words "and his heirs." The object of the deed was, that the grantee might sell the lands, and discharge, out of the proceeds of the sale, the grantor's debts. **Held:** That this deed passed a fee to the trustee, of which the latter had power to dispose and to pass to the purchaser.

An assignment or conveyance of an interest *in trust* will carry a fee without words of limitation, when the intent is manifest.

Under this deed the creditors of the grantor could have compelled a sale of this property, or of so much as was necessary to pay their debts.

APPEAL from *Washington* county court.

This was an action of *ejectment*. The appellees, the plaintiffs below, claimed the land as heirs at law of *Jacob Rohrer*, deceased. The appellants, the defendants below, claimed, under the deed from *Jacob Rohrer* to *Joseph Graff*, referred to in the opinion of this court. The judgment was for the plaintiffs and the defendants appealed.

The cause was argued before **SPENCE, MAGRUDER, MARTIN** and **FRICK, J.**

By **J. SPENCER** and **PRICE** for the appellants, and
By **TIDBALL**, for the appellees.

MAGRUDER, J. delivered the opinion of this court.

The appellees instituted their action to *Washington* county

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court to recover several parcels of land which they claimed as the heirs of *Jacob Rohrer*. The defendants also attempted to derive title from the same person, who, it is admitted was seized in fee of the lands until he executed a deed to *Joseph Graff*, 14 November, 1817.

The case being submitted to the court, upon a case stated, judgment was entered for the plaintiff, and from that judgment this appeal is taken.

The judgment must be affirmed, unless the deed to *Graff* authorized him to sell the fee-simple, which was sold and conveyed by him. Both *Rohrer* and *Graff* died before the institution of this suit.

Did the deed give *Graff* authority to sell the fee? It conveys the land to him, without adding "and his heirs," and if it had been designed to convey the absolute property, no doubt it would not have been a conveyance of the fee-simple.

But the deed of *Rohrer* was executed by a man involved in debt, and is executed by him in order that *Graff* might make sale of the land, and discharge his (the grantor's) debts. It is a conveyance of all his estate and all his right and title thereto, with power to sell the same, and pay those debts. If a deed of this description conveys land to the trustee and his heirs, we are told (4 *Kent*, 310) that the legal estate is in him so long as the "execution of the trusts requires it, and no longer." So "an assignment or conveyance of an interest in trust will carry a fee, without words of limitation when the intent is manifest." 4 *Kent*, 304.

The trustee, it is believed, had the power to dispose of the fee, and also "to pass the legal estate."

The estate conveyed to *Graff* was for the benefit of the grantor's creditors, and his creditors could have compelled a sale of so much of the property as was necessary, in order to pay all their debts. If he died, or was discharged as trustee, another could have been appointed in his place, and the chancellor could have empowered and have directed him to sell as much of the estate as would be sufficient to pay them.

A testator may direct a sale of his real estate for such a pur-

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pose, without naming any person by whom the sale is to be made, and the person who is empowered to make the sale, is authorized to sell and convey the fee. So the executor if authorized, may make the sale, although no fee is vested in him. "It is not any estate or interest of the grantee in the deed of trust which is to pay the debts; it is the estate of the grantor from whom the title is derived."

It cannot be doubted in this case that a sale of the fee was necessary in order to execute the trust, and that the deed was executed in order to give the grantee power to sell it. The trustee is to sell, pay the debts, &c., and the surplus whether lands, bonds, &c., to deliver to said *Jacob*, if alive, but if he die before the trusts are executed, then that surplus to be delivered to the heirs of said *Jacob*, or as said *Jacob* may before his decease direct by will, or other writing according to law.

JUGDMENT REVERSED WITH COSTS,

JOHN NEWCOMER, vs. JOHN A. KEEDY.

The plaintiff's counsel carried his *nars* in several actions against defendant, to the clerk's office and gave them to a deputy clerk, who endorsed them "filed." The counsel then offered to deposit them in the usual receptacle for such papers, and they were handed to him for that purpose without any entry on the docket of their being filed. The defendant and his counsel afterwards, at different times before the rule day to plead, called at the office to know if the *nars* had been filed, and were informed by the clerk and his deputies, after examination of the docket and box of deposit, that they were not. When the rule day had expired the plaintiff's counsel called to inquire for the pleas, and on being informed that his *nars* had not been filed, he went to the box in question and produced the *nars* from it. The pleas of not guilty and limitations were under these circumstances filed after the rule day. The court on application ordered the plea of limitations to be stricken out, and the case being tried on the general issue to the plea of *non cul.*, the defendant appealed from the final judgment rendered upon the verdict against him. **Held:**

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That the defendant not being in default, his plea of limitations should have been received, and that this point is sufficiently presented to this court on the appeal from the judgment.

It is a leading principle recognised in all courts of justice, that a party shall not be deprived of his plea or defence unless the default or neglect is his own.

A *nar* is not filed until it reaches its final place of deposit by the officer entrusted with it. It may be endorsed as filed and yet not actually filed in contemplation of law. The proper evidence that it is actually filed is the clerk's entry on the docket, to which the court and counsel resort as the true record of the pleadings, and where the rules to plead are laid upon the counsel.

The party who is to plead can never be in default until the rule is laid, or supposed to be laid.

To constitute notice to a defendant that he is under a rule to plead, it should be proved that knowledge of the *nars* being filed, did reach or might have reached him, or that he might have obtained it by reasonable inquiry.

The *nar* being mislaid by the act of the plaintiff, the defendant was in no default, and was under no obligation to plead.

APPEAL from *Washington* county court.

This was an action of trespass on the case brought by the appellee against the appellant, the late sheriff of *Washington* county, for a false return to certain *fi. fas.* upon judgments obtained by the plaintiff against *Abraham Barnes*. The defendant pleaded *not guilty* and limitations. The plaintiff applied for a rule to show cause why the plea of limitations should not be stricken out. Affidavits supporting the application were filed, the purport of which are fully stated in the opinion of this court. The court below made the rule absolute, and the cause was then tried upon its merits on the general issue to the plea of not guilty, and the verdict being in favor of the plaintiff, the defendant from the judgment rendered thereon appealed to this court.

The cause was argued before SPENCE, MAGRUDER, and FRICK, J.

PRICE for the appellant, insisted:

1st. It sufficiently appears what the precise point was which was brought to the attention of the court below.

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2nd. The defendant was not in default and his plea of limitations ought to have been received.

3rd. The declaration was not filed and the defendant was not under rule to plead when his plea of limitations was filed.

J. SPENCER and F. A. SCHLEY, for the appellee contended.

1st. The appeal ought to be dismissed because there is no bill of exceptions, and it does not appear on what ground the decision of the court below was rendered, 5 *G. & J.*, 494. 2 *G. & J.*, 303.

2nd. The rule of *Washington* county court is not here to show to this court what that rule was. It does not appear that no other testimony was taken except what is contained in the affidavits, and every thing will be intended in support of the judgment. 2 *H. & J.*, 41, 345.

3rd. If the rule does appear, it was in full force and effect and it was not competent for the court to receive the plea until the rule had been rescinded, modified, or enlarged, for the purpose of receiving the plea. If the appellant desired to file his plea of limitations after the rule day, he should have moved the court to enlarge the rule, to enable him to offer it.

4th. If the clerk neglected to do his duty after filing of the pleas, the appellees ought not to suffer by it. As a public and bonded officer, if the appellant suffers by his act he is responsible for it.

FRICK, J., delivered the opinion of this court.

The facts in this case spread out upon affidavits, may be thus condensed into what is material for our notice in expressing an opinion.

Several actions were instituted by this plaintiff, (now appellee,) against the defendant. The plaintiff's counsel carried the *nars* to the office, and handed them to the deputy clerk, who endorsed them as "filed the 25th September, 1848." The counsel then offered to deposit them in the usual receptacle for such papers, and they were handed to him for that purpose, without any entry on the docket of their being filed.

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Afterwards the defendant and his counsel, at different times before the rule day to plead, called at the office to know if any *nar* had been filed in the cause; and the docket and box of deposit both being examined by the clerk as well as his deputies, no indication of such *nar* being in the office could be found. When the rule day had expired, the plaintiff's counsel called to inquire for the pleas; and being informed that no *nars* had been filed, he went to the box in question, and from it produced the *nars* as stated in the depositions, and sworn by him to have been originally deposited there, enveloped in the writs, and confined together with a strip of paper around them.

The pleas were under these circumstances filed after the rule day; and upon "a rule to show cause why the plea of the statute of limitations should not be set aside," the court, upon affidavits and hearing, made the rule absolute, and a jury being sworn upon the general issue, verdict and judgment upon it was rendered for the plaintiff. From the "judgment thus rendered," the defendant appeals to this court; and the only question is, whether under these facts the plea was filed in time?

We are told that this question is not to be tested by the *English* rules of court and practice in relation to pleading, to which the appellant's counsel has referred; that these are either the results of their own acts of parliament, or the rules of particular courts adopted for the government of their own practice; that this question is to be decided by the rules of *Washington* county court, where the strict rule of serving copies of the pleadings, and of giving notice to the adverse party does not prevail, but each party at his peril, is bound to take notice of the day and rule to plead. This may all be admitted, and yet the practice of the *English* and other courts, be still properly invoked for such general principles as are alike applicable to every system of pleading, and cannot be excluded without violating that justice which they were designed to promote. One leading principle will be found recognized in all courts of justice, that a party shall not be deprived of his plea or defence, unless the default or neglect is his own.

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He is not to wait for notice from his adversary, but the rule is notice to him; and he is bound to go to the office to ascertain if his adversary is there. And if the adversary is out of time, he is to resort to other accessible sources to ascertain the position of his case. All this may be prescribed, or supposed to be intended, by the adoption of particular rule days, to ensure regularity and punctuality in pleading.

But the courts of *Maryland* have never undertaken to say by these rules, that a defendant shall be bound to plead to a declaration before it is filed; or when he can by no possibility have knowledge or notice that it has been filed.

When is the *nar* filed? It is said not to be filed until it reaches its final place of deposit by the officer entrusted with it. 9 *Bing.*, 66. It may be endorsed as filed, and yet not be actually filed in contemplation of law, if from the interposition of counsel, it takes the wrong direction and eludes the search of the clerk. The proper evidence that it is actually filed, is by his entry on the docket, to which the court and counsel always resort as the true record of the pleadings, and where the rules to plead are laid upon the counsel. Had this declaration been suffered to take the usual course of office business, all the clerks proved that it must almost of necessity have been so entered. And until so entered, the docket must have indicated that the plaintiff was under a rule to declare. And therefore, filed or not, how was the defendant to plead? He must be forwarned of some cause of action before he can be required to answer. And governed by the docket, he was under no obligation to answer. Who could lay the rule upon him? The court could not, because it was not in session; and it is equally certain that the clerk could not, because he did not know that a declaration had been filed. To deprive a defendant of a defence thus, which the law of the land says shall be a legal defence, the defendant should first be in default; and a party whose business it is to plead, can never be in default, until the rule is laid or at least supposed to be laid.

What shall be notice to a defendant that he is under a rule to plead? It should at least be proved that knowledge of this *nar*

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did reach or might have reached the defendant, or that he might have obtained it by reasonable inquiry. He did so inquire, as we think, diligently, and found neither *nar* nor rule to plead. The *nar* being mislaid, and by the act of the plaintiff he was under no obligation to plead. It would be a legal solecism to require it. How could he plead until some cause of action was exhibited on the part of the plaintiff? How could he know the nature and character of the plaintiff's claim? Such cannot be the fair construction of any rule, that it can compel a defendant to plead before a declaration is filed, or when he can have no knowledge that it is filed.

Whatever be the actual state of the case, we cannot consider the defendant here, in default. The offer of plaintiff's counsel to see these *nars* properly disposed of, throws the burden from him; and we can only explain the error by supposing, that wherever deposited, the writ and envelope by which they were confined together, concealed the endorsement upon them, and prevented discovery.

It is however said, that this court ought not now to disturb the judgment, the jury having declared the substantial merits of the case, which nothing could have defeated but this plea of limitations, which is always considered odious and repugnant to a proper sense of justice.

It is true, that this defence is usually denounced as the unrighteous and dishonest refuge of a debtor, evading a just and legal liability. But such is not the reasoning of the law, in affording by this plea, the protection it contemplates. It has doubtless been often used and abused in the evasion of an honest claim, and in defeating just and fair contracts, of which the party has had the full usufruct and benefit; and often without any corresponding benefit to the creditor. And where there is any discretion left with the court, such cases present a strong appeal to their moral sense. But no such feature of dishonesty is disclosed in the case before us. The cause of action arose as far back as 1839, upon certain executions, delivered to the appellant, as sheriff of the county, which were by him returned "*nulla bona.*" Without renewing these writs, or

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pointing out any property to which the writs would attach, the plaintiff suffers the claim to sleep for a period of seven or eight years; and then alleging that there was, at the time, property which was liable to the execution, he brings this action against the appellant for a false return, and seeks to make it available against him. Surely such an action is at least as destitute of merit in an application to the favorable consideration of a court of justice, as the plea of limitations in its worst aspect.

It is objected, however, that this case is not properly before this court, upon any point that appears to have been presented to the court below, as directed by the act of 1825, ch. 117; that the appeal is from the judgment as rendered, without specifying the defect in the judgment. The opinion of this court, in the case of *Cushwa vs. Cushwa*, (*ante* 242,) similar and parallel in its character, disposes of this objection, and decides that a case in this form, is properly before us upon appeal.

JUDGMENT REVERSED, AND
PROCEDENDO AWARDED.

JOSEPH CRESAP'S LESSEE, vs. HENRY HUTSON.—*December*
1850.

A plaintiff in an ejectment suit, after the commencement of the action, but before trial, conveyed by deed, his interest in the lands in controversy, to a third party. **Held:** That this deed was a bar to his recovery.

To recover in ejectment, the lessor of the plaintiff must have the legal estate in the land, both at the commencement and *trial* of the cause.

The title to lands draws to it the seizin, so that one who has title, is by force of his title, in possession, until an ouster or disseizin is committed upon him, by some one entering upon the land, with a claim of adverse possession.

Where a person claims by possession only, without showing any title, he must show an exclusive, adverse possession by enclosure, and his claim cannot extend beyond his enclosure.

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There must be a real and substantial inclosure, an actual occupancy, or *possessio pedis*, which is definite, positive, and notorious, to constitute an adverse possession, when that is the only defence to countervail the legal title.

No adverse possession short of twenty years, will destroy the legal title.

The deed of a plaintiff in ejectment, conveying the lands in dispute, made after commencement of the suit, is not void, because the defendant, at the date of its execution, held adverse possession of the land.

Two brothers whose farms adjoined, were both mistaken about their division line. **Held**, that this mistake could not affect the title of either. And the one who held over on the other, cannot claim adverse possession, because, he and the real owner supposed the division line to run in a different direction: neither held adversely to the other.

A *bona fide* conveyance of the land in dispute, for a valuable consideration, made after commencement of the suit by the plaintiff, in an action of ejectment, is not void for maintenance, or champerty.

A defence on warrant, is not necessarily a defence by adverse possession.

A defendant, at first, took defence on warrant for the whole land in dispute, which he afterwards abandoned as to part. **Held**, that the plaintiff could not make use of the first defence, in order to show adverse possession of the whole in the defendant.

If a party pleads *payment*, and afterwards substitutes for that plea *non est factum*, the former plea cannot be relied on, to prove the instrument his deed.

It is no objection to the competency of a witness, that he is the acting attorney for the party, in whose favor he offers to testify. Such objections go to the credibility, and not the competency of a witness.

APPEAL from *Allegany* county court.

This was an action of ejectment, brought on the 10th of August, 1844, by the appellant against the appellee, for lots No. 3501, 3502 and part of "*Deer Park*," situated in *Allegany* county. Plea not guilty, and defence on warrant.

The following are the prominent facts in the case, necessary to an understanding of the several bills of exceptions. *James D. Cresap* devised by his will, certain lands to his son *Joseph*, the lessor of the plaintiff, and others to his son *James*, all of which are described by metes and bounds in the will. These lands lay contiguous to each other, but the division line had never been run by the two brothers. On the 7th of March, 1844, *James* sold and conveyed his lands thus given him, to *Henry Hutson*, the defendant. Shortly after this conveyance,

Joseph Cresap and *Hutson* had their lines run, when it was discovered, that the division line was not where it had been supposed to be. By this discovery, it was ascertained that *James Cresap* before, and *Hutson* after, the sale, had claimed and possessed the lots in controversy, or a part of them, which belonged to *Joseph Cresap*, under the will.

On the 8th of March, 1847, before the trial of the case, *Joseph Cresap*, the plaintiff, conveyed the whole of his farm, including the land in dispute, to *Elizabeth C. Tomlinson* and *Hannah Gastell*. At the trial, the defendant offered this deed in evidence, and the court, upon his application, determined that it put the plaintiff out of court, being of opinion that the plaintiff, to recover in ejectment, must be able to show title at the time of trial, as well as at the commencement of the suit, and the plaintiff was non-suited.

This non-suit was, upon further consideration, stricken out and the cause reinstated, the court being of opinion, that the deed could not convey the land in controversy, the same being at the time, in the adverse possession of the defendant. To meet this objection, the defendant obtained leave to narrow his defence, with a view to show that some portion of the land in dispute, had been in the actual possession of the plaintiff, thereby to give him a constructive possession of the whole, and make the deed good for the land in controversy.

Much testimony was taken, and various title papers, plots, &c., offered in evidence, all of which sufficiently appear from the exceptions taken, and the opinion of this court.

1ST EXCEPTION. Was taken to the refusal of the court, (MARTIN, C. J., and MARSHALL, A. J.,) to instruct the jury that there was no proof of such part possession of the lots in dispute by the plaintiff, as would invest him with constructive possession of the whole.

2ND EXCEPTION. To the rejection of the prayer, that the parties holding lots divided by a line not distinctly ascertained, both intending to hold to the line wherever it might be, but neither to hold any part of the other's land, if they found upon an accurate survey that the true line was wide from the place

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they supposed, and that one was holding upon the other, such accidental and involuntary holding of part, though with title to the whole, would not vest him with constructive possession of the whole, and therefore the plaintiff's deed did not convey the lands in controversy.

3RD EXCEPTION. To the rejection of the prayer, that if defendant took defence for, and claimed the whole of, the lots in dispute, at the time of the execution of said deed, it is void, and plaintiff is not thereby precluded from recovering, notwithstanding defendant may have narrowed his defence so as to exclude part of the lots from his claims.

4TH EXCEPTION. To the rejection of the instruction that the whole of the lands are covered by the claims and pretensions of defendant, and by admission of this fact in pleading, he is now precluded from saying he only claims a part of the lots.

5TH EXCEPTION. To the rejection of the instruction that if that part of "*Deer Park*," claimed by defendant, never was in the actual possession of the plaintiff, but was at the institution of this suit in the possession and use of defendant, who claimed it as his own property, then the deed in question as to that part is void, and does not preclude the plaintiff from recovering the same in this action.

6TH EXCEPTION. To the rejection of the instruction that the said deed of the plaintiff is void for champerty and maintenance.

7TH EXCEPTION. To the overruling an objection to the competency of one of the counsel for the defendant, who took part in the trial of the cause, as a witness in behalf of his client.

8TH EXCEPTION. The plaintiff offered a bill in chancery filed by defendant against *James Cresap*, to prove defendant's admissions in relation to his possession of the land in controversy, which evidence the court rejected.

9TH EXCEPTION. The plaintiff offered to prove that while his father, *James D. Cresap*, was writing his will, under which the parties claim, the plot AB was on the table before him. This evidence was rejected as inadmissible.

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10TH EXCEPTION. To the rejection of the instruction that if the plaintiff had title at the time of the demise laid, and the commencement of the suit, he can recover notwithstanding his deed of the 8th of March, 1847.

11TH EXCEPTION. To the rejection of the instruction that the cutting of timber by plaintiff beyond the true location of the division line, is not such possession as would give him constructive possession of the whole lots, if at the time of so cutting he did not claim or intend to claim title by said cutting to the lots on which said cutting was done.

The verdict and judgment was for the defendant, and the plaintiff appealed.

The cause was argued before SPENCE, MAGRUDER and FRICK, J.

By MCKAIG and PRICE, for the appellant, and

By GEO. A. PEARRE, for the appellee.

The several bills of exception indicate the points made in argument.

MAGRUDER, J., delivered the opinion of this court.

This appeal is taken from a judgment rendered in *Allegany* county court. The suit was brought to recover divers parcels of land for a part of which the defendant took defence. There are many exceptions to be found in the record, few questions however are presented by them.

The plaintiff undertook to prove title to the lands in controversy, and we are to assume that the will of *James D. Cresap*, his father, gave him title to the lands, and that the title continued in him until a conveyance was made by him of all the land to *Elizabeth C. Tomlinson* and *Hannah Gastell*, by deed bearing date the 8th day of March 1847.

Whether this deed was a bar to the recovery of the lands in controversy, seems to be almost the only question arising in the case, and almost all the exceptions were taken because of a refusal by the court, to give to the jury instructions designed

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to tell them that the deed spoken of, did not hinder the plaintiff from obtaining a verdict.

We find, to be sure, in some of the exceptions, that the court after refusing to give the instructions which were asked for, did sometimes give others. For these however the plaintiff does not claim a reversal, and moreover whether correct or not, does not appear to be very material, as the plaintiff was not injured by them.

We infer from the various prayers made by the plaintiff, that he claimed the verdict notwithstanding his conveyance: 1st. Because the deed being of a later date than the lease declared on, could not prejudice the supposed title of the lessee; and 2nd. Because it was an attempt, pending the suit too, to convey land, of which another had the adverse possession.

If the deed of the plaintiff does not for either of these reasons prevent a recovery, it is thought that there is nothing in the record which will warrant a reversal of this judgment.

Of course it cannot be denied that in order to sustain an action of ejectment, there must be proof of title in the lessor at the time when the alleged lease commenced. Without this proof the lease would give no title. But it is said, that if the plaintiff had a title when the suit commenced he may maintain the action, because no subsequent conveyance by him could prejudice the lessee whose lease is admitted. This would be true if there really was a lease, and the lessee was the real plaintiff. But there is none, and for the want of one the plaintiff could not recover, but for the terms imposed upon the defendant when he asks to take the place of the casual ejector.

Care is to be taken that these fictions do not work wrong to the defendant. If the plaintiff succeeds he recovers the whole of the term declared upon, and in his action for the *mesne* profits, he has to prove, to be sure, that the defendant retained the possession during the time for which he claims the rents and profits, but the judgment in ejectment is all the proof that is required, that he was entitled to the demised premises during the whole term mentioned in his lease. If in the action for *mesne* profits, the plaintiff recover damages as long as the defendant

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retains the possession, the latter might be compelled to pay damages twice, as no doubt the vendee pending the suit might recover all that could be claimed for the occupation of the premises subsequently to the deed to him, provided the deed be valid. A second action of ejectment might also be brought by the purchaser. For some such reasons as these, this court said in 5 *H. & J.*, 173: "To recover in this action of ejectment, the lessor of the plaintiff must have the legal estate in the land at the *commencement* and *trial* of the cause," and decided that no recovery could be had of the shares claimed by the lessors who had previously to "the trial parted with their estates." This was no *dictum* of the judge who pronounced the opinion, but was the principal ground for an affirmance of the judgment. As this has been the law of Maryland ever since the year 1820, it can scarcely be necessary for us in deciding this case to inquire, whether this be the law elsewhere?

But we are told that the deed from the plaintiff's lessor, dated 8th March 1847, cannot defeat his action, because at the time of its execution, the defendant had an adverse possession of this land.

None of the authorities which have been cited, make any distinction in this respect between a sale before the institution of a suit, and a sale while such suit is pending. The question is, whether the defendant had such a possession at the date of this deed, as would render a deed for the land by the plaintiff's lessor a nullity? If there be in *Maryland* any such law, it is strange that it was unknown to the many learned jurists, who in times past have been at our bar and on our bench. Very many and most important cases of which we have reports, certainly might have been defeated, if such be our law.

In the case of *Davidson vs. Beatty*, (3 *H. & McH.*, 594,) the plaintiff's lessor obtained his title as late as 1796, from a man who as far back as the year 1768 lost the occupancy, and he thought the title, to the property in dispute. The man who entered upon it, and it was supposed dispossessed him of it, sold it. The land was laid off into lots, which formed a part of *Georgetown*, in the district of *Columbia*, and upon many

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of them houses had been erected before, and were occupied at the date of, the deed from *Gordon* to the plaintiff's lessor, and yet no one, after the decision of the questions touching *Gordon's* title, notwithstanding the judgment of condemnation, supposed that any adverse possession short of twenty years would have destroyed the deed to *Davidson*, if that deed had been properly acknowledged and recorded.

The same objection might have been taken to the title of the plaintiff's lessor in the case of *Ridgley's lessee against Ogle and Leonard*, (4 H. & McH., 123.) Many other cases might be mentioned, in which the plaintiff's title commenced after it was supposed that the tenant in possession had so long occupied the land, that adverse, continued and uninterrupted possession, was sufficient to give him a good title. See also *Gittings vs. Hall*, 1 H. & J., 14.

In 2nd *Smith's* leading cases, p. 413, we are told that "it is a settled principle in the law of apparently all the States, that title to lands from the commonwealth, draws the seizin or actual legal possession to it; so that one who has title derived out of the commonwealth, is, by force of his title, in possession until an ouster or disseizin is committed by some one entering upon the land, with a claim of possession adversely to him."

Among the numerous American cases to which reference is given for this, is that of *Miller vs. Shaw*, 7 Serg. & Rawle, 129. In that case Judge *Duncan* said: "Constructive possession always accompanies the right. The right always draws to it the possession, and it there remains until seized by the wrongdoer, whose possession is strictly *possessio pedis*, who must necessarily be confined to what he has grasped—his real and actual possession. Beyond that no length of time will protect him; because beyond that the owner's possession has never been changed. "These," he adds, "are the dictates of common sense, of common justice and of common law."

In some of the States it would seem to be somewhat doubtful what constitutes this adverse possession in a trespasser, and which turns the real owner out of possession. In the very case to which a reference has been given in *Sergeant & Rawle*,

the judges seem to have discovered that even then (in 1821,) this was in *Maryland*, *res adjudicata*. They refer to one of our own decisions (*Davidson's lessee, vs. Beatty*, 3 H. & McH. 594,) where the law is distinctly laid down, "that where a person claims by possession only, without showing any title, he must show an exclusive adverse possession by enclosure, and his claim cannot extend beyond his enclosure." In 2 H. & J., 156, the court expressed it thus, "a naked possession, (possession without right,) is adversary only to the extent of actual enclosure."

In 2nd *Johnson's N. Y. Repts.*, 234, it is laid down that "there must be a real and substantial inclosure, an actual occupancy, a *possessio pedis*, which is definite, positive and notorious, to constitute an adverse possession, when that is the only defence and is to countervail a legal title." In *Barr vs. Gratz*, (4 *Wheat*, 213,) the Supreme Court held, that a patent granted for vacant land vested the patentee, by operation of law, with a constructive actual seizin of the whole land contained within the patent." In 2nd *Gill & Johnson*, 183, Judge *Earle* says, "it is a case of constant occurrence, where a grantor having a right of entry on land, conveys it to another and therewith necessarily a power to maintain an ejectment for it."

The pending of this suit, at the date of the deed, could not render it a void deed. The plaintiff surely cannot say this was a sale of a pretended title, nor was it the sale of a law suit, as might be said of the case of *Hammond vs. Dorsey's lessee*, which we learn in 5 H. & J., 267, was entered for the use of *Richard Ridgely*, prosecuted at his expense and for his benefit, and being for his use was considered to be his suit.

Those who have gone before us have not left us to settle the law, that the plaintiff, to sustain an action of ejectment, must have a title not only at the commencement of the suit, but also at the trial, and certainly never discovered that the deed which defeats the suit, if made after its commencement and before the trial, was, for any of the reasons suggested, void. If there be any such law in England, it would seem that it was not found applicable to "our local and other circumstances."

We cannot think that because of any of the circumstances

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spoken of in these various prayers, the jury (if satisfied of them,) ought to have been required to give a verdict for the plaintiff.

There is certainly reason to believe that the plaintiff and his brother were both of them mistaken about the division line, but any such mistake cannot affect the title of either. Surely the defendant cannot claim by adverse possession, because he and the real owner supposed the line which divided their farms to run in a different direction. Neither held adversely to the other.

We see nothing in the record, which would warrant us in saying, that the plaintiff, when he executed this deed, was guilty either of maintenance or champerty. The case affords us no opportunity of enforcing or recognizing such law on this occasion.

At the time this deed was executed, the defendant had taken a defence, which he afterwards abandoned; and the plaintiff would make use of this defence, in order to avoid his own deed. This he could not do at the trial, even if the defendant had not narrowed his defence; a defence upon warrant, is not necessarily a defence by adverse possession. If the defendant could have given himself an adverse possession by his defence, as originally taken, when it is abandoned, the plaintiff could not well use it for any such purpose. If a defendant pleads *payment*, and afterwards substitutes for that plea, *non est factum*, the former plea cannot be relied on, to prove the instrument to be his deed. The plaintiff must take judgment against the casual ejector, for all the land undefended, and surely cannot make the defendant hold any part of it adversely.

There remains one other exception in the record of which we must dispose. It presents the question, whether an attorney for a suitor, can also be a witness for him?

The same question was put to us in a case (*Beatty vs. Davis*,) which has been argued and decided this term, (*ante* 211.) In this case, the witness was offered for examination, after he had opened the case. We have been referred to several *English* and *American* cases, which, it is thought, sustain this objection.

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These cases certainly furnish proof, that courts of justice are not disposed to approve of such a practice. One of the judges said, "it is not fit, that he should be heard as a witness." In the other *English* case, the judge said, "I think it a very objectionable proceeding on the part of an attorney, to give evidence, when acting as advocate in the cause." In both cases, the verdict was set aside. But in this case, if we had the power, we should not for this reason, grant a new trial. The objection to counsel acting as a witness, does not apply, where the testimony is such as was offered in this case. We must leave the practice as we find it, and let it go to the credibility, rather than to the competency of a witness.

We find in none of the exceptions to which the record calls our attention, any reason for reversing this judgment.

JUDGMENT AFFIRMED.

JACOB CLAMMER AND HIS SECURITIES, vs. THE STATE OF MARYLAND, USE OF AZA BEALL.—*December 1850.*

In an action on a collector's bond, the defendant failed to plead, and judgment by default was entered against him. On the same day of the entry of this judgment upon *nil dicit*, the following entry was made on the docket: "judgment for \$30,000 debt, and \$60,000 damages and costs; damages to be released on payment of \$428.28, with interest from 1st of March, 1840, and costs \$9.82." **Held:** That parol evidence is admissible to prove that this judgment was agreed to be final by confession; that in recording the last judgment, it was intended to supersede the judgment by default, and that its remaining on the docket was a clerical error.

No execution could be issued on this judgment in this state of the entries, until the judgment by default is erased and corrected.

In an action upon a bond with a collateral condition, the breaches must be somewhere suggested in the pleadings or on the roll. No judgment on such a bond can be final, until the damages are ascertained, and as a proper foundation for this, breaches of the condition must be suggested.

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The plaintiff may, however, waive a judgment by default, and in lieu of damages assessed upon breaches which he was at liberty to suggest upon the roll, substitute a confession of them by defendant.

APPEAL from *Allegany* county court.

This was an appeal taken from an order of the county court, overruling a motion to quash an execution issued upon a judgment obtained by the appellee against the appellant and his securities, upon his official bond as a collector of *Allegany* county.

The facts of the case are fully stated in the opinion of this court.

The cause was argued before SPENCE, MAGRUDER, and FRICK, J.

By GEO. A. PEARRE, for the appellants, and
By McKAIG, for the appellee.

FRICK, J., delivered the opinion of this court.

In this case suit was instituted upon the official bond of the appellant, as collector of *Allegany* county. At the time of issuing the writ, the plaintiff filed in court a copy of the official bond of the appellant, with an account and promissory note admitting the amount due by the appellant. The declaration was regularly filed, and a rule laid upon the defendants to plead thereto. The defendants failed to plead, and thereupon judgment upon *nil dicit* was entered on the 15th day of October, 1842. Immediately following this judgment on the rule, and on the same day, the docket entries continue thus: "Judgment for \$30,000 debt, and \$60,00 damages and costs; damages to be released on payment of \$428.28, with interest from 1st day of March, 1840, and costs \$9.82."

On the 24th of June, 1845, execution was issued upon this judgment, which was endorsed "to lie," and no return was ever made. On the 29th of August, 1848, a second *fi. fa.* was issued; no entries of any continuances of the former *fi. fa.* appearing on the docket.

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This second *fi. fa.*, the appellants moved to quash, for reasons filed with the motion, in substance: that the judgment was interlocutory and not final, and upon such judgment no execution could issue until breaches are assigned, and damages assessed to render it final; and that breaches were neither assigned or damages assessed.

The appellee produced depositions to show that it was the intention of counsel for the parties, that the judgment should be final upon agreement and confession. And the court after argument upon the motion and affidavits, determined that the affidavits were not admissible to show that the judgment was other and different from the judgment shown by the proceedings; but that apart from the affidavits, the proceedings rightly construed, show a final, not an interlocutory judgment.

There can be no question that where the action is upon a bond with collateral conditions, the breaches must be somewhere suggested in the pleadings or upon the roll. No judgment upon such a bond can be final until the damages are ascertained; and no proper foundation for the assessment is properly laid, until the breaches of the condition are suggested. If we assume, therefore, that the judgment on the rule plea is the only judgment which the court can regard in this case, it is but interlocutory, "that the plaintiff ought to recover his damages," and any execution upon it would be improvidently sued out. No execution could have been issued upon it, because the execution necessarily directs the levy of damages, which were never assessed under the default. The execution, then, was of course issued upon the subsequent judgment in which damages are ascertained and entered. And the question arises, is that such a judgment, final in the cause, *non obstante* the preceding entry by default, as will support this execution?

The only mode to dispense with the requirements of the statute of 8 & 9, *Will. III, ch. 11*, must be by the confession of the judgment; and there can be no question, that standing by itself, this would be considered a full and final judgment and confession. See the case of *Clarke vs. Digges*, 5 G., 118.

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The entry of the default preceding it, out of the way, would leave the case free of difficulty. That entry presents a case with two judgments, which cannot subsist together. It was, however, competent to the plaintiff to remit the default, and accept the confession of a judgment. Upon such terms, the plaintiff might surely waive his default, and in lieu of damages assessed upon breaches, which he was at liberty to suggest upon the roll, substitute a confession of them by the defendant. And if these are to be construed as distinct judgments, that deform the record and contradict each other, why should explanatory evidence be excluded, that establishes the fact, that in recording the last judgment, it was intended to supersede the first? They could not have intended to make two judgments, and both worthless as they now stand; or that the latter judgment should continue a nullity, and the preceding default remain in force. Is it probable that this release could find its way into the record, without intending the proper correction of the entries, to make it available? The mere act of the clerk in striking out the default, would make it so. And the county court in their decision, would seem to treat it as out of the case, or regard it as surplusage; and considering that done which ought to have been done, have determined that the entries, all standing, and rightly construed, show a final, not an interlocutory judgment.

Without going to the extent of this decision of the county court, which leaves we think, these entries opposed to each other, we arrive at the same conclusion, that this last entry, ought to stand as the final judgment. We rest it chiefly, however, upon the affidavits of both the counsel, which prove that the judgment was agreed to be final by confession, and that of course, the default as inconsistent with this agreement, was remitted. It must be recollected, that there were papers filed in the cause, which, without the consent of counsel, were entirely irrelevant to the pleadings. But they purported to show the ascertainment of the debt between the parties, and by the release entered, show, that they were substituted for an assessment by a jury, and adopted as part of the case. Surely in

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this position of a case, the parties have a right to waive the delay and expense of an inquiry upon breaches alleged, and agree to the terms of the judgment. In so doing, the default was overlooked by both clerk and counsel, and its remaining on the docket is a clerical error. The affidavits, we think are competent to show this, and were properly offered, not to contradict the record, but to show this clerical error, and restore the consistency of the pleadings. The latter judgment now, is as much a part of the record as the first, no matter how it got there. And as they are distinct and contradictory, one of them is necessarily a clerical error. And we are left to no intention in the case, when the affidavits so clearly show, that in entering the last, it was intended to supersede the first; and in rejecting these affidavits for this purpose, we think the county court erred.

But it has been urged by counsel, that we are to look at the case, as extended upon the record, and not to the docket entries; and as extended, it is treated as a judgment upon *nil dicit*. That the clerk has so treated it in one respect, is true; because, finding the default upon the docket entries, he could not do otherwise. But further inspection will show, that he has further introduced the second, and treats it as the final judgment. Without falsifying the entries, he could not do otherwise.

We agree with the county court then, so far as to confirm this last judgment. We think, however, it cannot be made to support this execution, until the previous default is erased and corrected. To enable the party to make the necessary correction, the case will be returned to the county court. In the meantime it results necessarily, that the execution was providently issued in this state of the entries. We reverse, therefore, the order of the county court, overruling the motion to quash it, and allow a procedendo, to afford the proper occasion to correct the entries.

ORDER REVERSED, AND

PROCEDENDO AWARDED.

Hoffman and Rizer, vs. Coombs.—1850.

JOHN G. HOFFMAN AND MARTIN RIZER, vs. JOHN COOMBS.
December, 1850.

A promise made by the payee and holder of a promissory note to the maker upon maturity of the note, that the latter might retain the money due on it for a longer time, being without consideration is a *nudum pactum*, and does not release parties liable as endorsers or securities upon the note

A promissory note was drawn by the maker payable to the order of the plaintiff the holder "negotiable and payable at the *Cumberland Bank of Allegany*." Upon the back of this the names of the defendants were written. HELD: That this note itself is not *prima facie* evidence that the defendants placed their names upon it as makers or original promissors and not as endorsers.

It is *prima facie* a note to be offered for discount at bank, and not elsewhere, and is made payable to the plaintiff, in order that he may become the first endorser.

Exceptions taken by a party who does not appeal, cannot be introduced into the record on an appeal by the other party.

APPEAL from *Allegany* county court.

This was an action of *assumpsit* brought by the appellee against the appellants upon the following promissory note.

"\$618.

CUMBERLAND, August 6th, 1845.

Four months after I promise to pay to the order of *John Coombs*, six hundred and eighteen dollars for value received negotiable and payable at the *Cumberland Bank of Allegany*.

JONATHAN BUTLER."

On the back of this note the names of the appellants were endorsed in blank, and over them the plaintiff at the trial wrote so that the endorsement read as follows:—

"August 6th 1845. For value received we undertake to pay *John Coombs*, the sum of money in this note specified according to the tenor and effect of the said note.

JOHN G. HOFFMAN.

MARTIN RIZER."

The declaration contained several counts against the defendants as makers of a promissory note of the same effect as the above, and as guaranteeing the payment of the note made by *Butler*, and the common money counts. Plea *non assumpsit*.

1ST EXCEPTION. The signatures of *Butler*, *Hoffman* and *Rizer*, being admitted, the defendants offered the testimony

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referred to in the opinion of this court and asked an instruction to the jury, that the agreement of the plaintiff to let *Butler* have the money again or for a longer time, proved by said testimony, and made without the knowledge or consent of defendants, discharged them from all liability on the note. The court (MARTIN, C. J., and MARSHALL and WEISEL, A. J.) refused to grant this instruction and the defendants excepted.

2ND EXCEPTION. In this exception the court refused to grant a prayer of the defendants that the *prima facie* or legal presumption to be drawn from the note itself, is that the defendants by putting their names upon the back of it intended to become indorsers and not makers or original promissors in said note, but instructed the jury that the note itself was *prima facie* evidence that the defendants placed their names on the back of said note not as endorsers, but as makers or as original promissors on said note. Defendants excepted.

3RD EXCEPTION. In this exception the court instructed the jury, at the instance of the plaintiff, that the agreement between plaintiff and *Butler* proved by the testimony, did not release the defendants from their liability on the note. Defendants excepted and the verdict and judgment being against them, they appealed to this court.

The record also contains several exceptions taken by the plaintiff, but no appeal was taken by him.

The cause was argued before SPENCE, MAGRUDER and FRICK, J.

By MCKAIG, for the appellants, and

By GEO. A. PEARRE, for the appellee.

MAGRUDER, J. delivered the opinion of this court.

The appellee, who was the plaintiff in the court below, claimed the amount of a promissory note, which, according to its language, was negotiable and payable at the *Cumberland Bank of Allegany*. The note was drawn by one *Jonathan Butler*, payable to the plaintiff in the court below. On the back of this note so to be negotiated and paid, the names of the

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appellants are to be found written first in order the name of the appellant, *Hoffman*, and below it that of the other appellant, the handwriting of each being admitted.

At the time of the trial, there were written over their signatures, these words:

“August 6th, 1845. For value received, we undertake to pay to *John Coombs*, the sum of money, in this note specified, according to the tenor and effect of said note.” These words are in the handwriting of the appellee, the holder of the note.

The appellants gave testimony, that some time in the summer of 1848, the appellee, speaking of the note of *Butler*, then in his possession, said that he had good endorsers upon it; that at the maturity of said note, *Butler* came to him and offered to pay the said note off promptly; *Butler* at the same time remarking, that if he (the appellant) did not want it, he, (*Butler*,) would like to have his money again, or for a longer time; to which proposition he assented, and permitted *Butler* to retain the money.

It was insisted, that this was a new loan to *Butler*, and discharged the previous debt, and with it any liability of the appellants; and the defendant below prayed the court so to instruct the jury. The court refused, and we think correctly. The promise to let *Butler* have the money a longer time, being without consideration, was *nudum pactum*. See *Planters Bank of Prince Georges county against Sellman*, 2d Gill & Johnson, 230.

This action is brought, not against the drawer of the note, but against the two persons who indorsed it, or who wrote their names on the back of it.

The case has been argued on both sides, as if this was a blank indorsement. If we could so understand it, we should find no difficulty in distinguishing this case from former decisions of this court, to which reference was given to us. The law in such cases is also to be found in *Story on Prom. Notes*, secs. 479, 480.

We cannot, however, assume, that these were original blank endorsements. The words written over the names of the ap-

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pellants, bear date the very day that *Butler's* note is dated. The case then is not precisely what it was supposed in the argument to be.

We, however, reverse the judgment of the court below, because of the instruction which was given, and which is to be found in the second exception. We do not think with *Alleghany* county court, that the note itself is *prima facie* evidence, that the defendants (appellants) placed their names upon the the back of said note, not in the character of endorsers of said note, but as makers, or original promissors.

There was no evidence furnished by the written paper, or *aliunde*, of any previous indebtedness to the appellee. It is not shown by what authority he wrote the words, which are found over the signature; how or when the appellants were prevailed upon to have any connection with, or to make themselves answerable for, any debt which *Butler* might owe to, or was about to contract with, the appellee.

It appears too, that this was a note, negotiable as well as payable at the *Cumberland Bank of Alleghany*, and is in form, not only what the charter of that bank says, that all notes there to be discounted must be, but is in the usual form of notes to be discounted by banking institutions only. It is then *prima facie*, a note to be offered for discount at bank and not elsewhere, and is made payable to the appellee, in order that he may become the *first* indorser.

It is immaterial, whether the second indorser writes his name before or after the endorsement by the payee, but the mischief would be incalculable, if, when the person who is relied upon as the first indorser, gets possession of a note already endorsed by one, who, according to the understanding of the parties, is to be the second endorser, he can fill up the blank, which *prima facie* is left for his own name, with such an undertaking as is here offered in evidence.

We cannot discover that the appellant was aggrieved by the opinion of the court, expressed in the third bill of exceptions.

The exceptions taken by the plaintiff in the court below,

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have been improperly introduced into the record and make no part of it.

1st and 3rd exceptions affirmed; 2nd dissented from.

JUDGMENT REVERSED, AND
PROCEDENDO AWARDED.

CHRISTOPHER RODEMER, vs. JOSEPH GONDER, HENRY
HAZLEHURST, & Co.—*December* 1850.

The plaintiff made a contract with defendants for grading a section of rail road, to be completed by the 1st of October, 1845. By this contract monthly estimates were to be made by the defendant's agent, of the quantity and value of the work done during the month, *four-fifths* of which value was to be paid to the plaintiff immediately, and the balance on completion of the work, said estimates to be conclusive between the parties. If the plaintiff failed to comply with all its terms, or if it should appear to their agent that the work does not progress with sufficient speed, the defendants may annul the contract, upon giving to the plaintiff *three days' notice* in writing to that effect, in which case the plaintiff was to forfeit the unpaid value of the work done. This right to annul was not to be *mutual*, but to be exercised by defendants only. Estimates and payments abating the one-fifth were made up to the 29th of October, 1845, and the work was prosecuted by plaintiff until the 6th of November following, when defendants, *without notice*, entered upon and expelled the plaintiff from the work.

HELD :

That by this act the defendants annulled the contract, and thereby released the plaintiff, and he may sue in general *assumpsit* for the value of the work actually done, and is not bound to resort to his special action on the contract.

Where there is a special contract and the plaintiff has performed a part of it according to its terms, and is prevented by the act or consent of the defendant from performing the residue, he may recover in general *assumpsit* for the work actually done, and the defendant cannot set up the special contract to defeat him.

Putting an end to a contract by one party is an abandonment of it by him, and if his acts in so doing are such as necessarily to prevent a performance on the part of the other, the whole contract is rescinded, and the other party may resort to his *quantum meruit*.

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Where a contract contains a number of distinct stipulations, which admit of being separately executed and closed each is taken distributively, and considered as forming the matter of a separate agreement after it is so closed. In this case the plaintiff is concluded by the monthly settlements, and by reason of their being closed as distinct and separate portions of the contract, he cannot open them again to prove and recover the actual value of the work.

These partial payments bind him to the whole settlement, and so far as the work has been adjusted under the contract he can recover only the balance due upon the basis of these settlements, including the one-fifth reserved for ulterior settlement.

The defendants by their own acts depriving the plaintiff of the means and opportunity to comply with his contract, have released all claim to the forfeiture mentioned in the agreement.

So far as work has been performed which remains unadjusted between the parties by the monthly estimates, the plaintiff is not bound by the contract, but is at large upon his *quantum meruit* and may prove the actual value of the work.

The stipulation in this contract that the right to annul it is not mutual, means that the defendants may, in any state of things, hold the plaintiff to his contract, while for causes alleged they are free to break it; but it further means that if they exercise this privilege it is then broken, because once repudiated by the defendant it cannot bind the plaintiff.

APPEAL from Allegany county court.

The appellant (the plaintiff below,) made a contract with the appellees (the defendants below,) for grading a section of railroad. The terms of the contract are sufficiently stated in the opinion of this court. The defendants having in the manner stated in the opinion prevented the plaintiff from prosecuting the work, the latter brought his action of *assumpsit* for the value of the work done. The declaration contains counts for work and labor, and materials furnished, and the common money counts. Pleas, *non assumpsit*, payment, and set off.

1st and 2nd EXCEPTIONS. The plaintiff having offered evidence of the quantity, character and value of the work done, proposed to ask a witness whether there was any place at the work or on the section, where laborers could be boarded, at the time the plaintiff commenced work, and whether he was not obliged to put up houses or shantees in which the hands might be boarded, and whether or not from these facts, and the situation

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of the section on the mountain, the value of the work done was enhanced? To these questions defendants objected as not relevant to the issues, and the court (*Marshall and Weisel A. J.*,) being of that opinion, would not permit them to be asked, and the plaintiff excepted.

3RD EXCEPTION. The defendants then offered in evidence the special agreement referred to, and proved that the work, of which the plaintiff had given evidence was all done under said contract: that monthly estimates of the work and payments upon it were made according to the terms of the agreement, up to the 29th of October, 1845; that on the 6th of the following month defendants entered on the work, and gave notice to the laborers that they intended thenceforth to conduct the work in their own names, which they accordingly did, the plaintiff leaving the work after protesting against this interference. Defendants then asked the two instructions set out in the opinion, both of which the court granted, and plaintiff excepted.

4TH EXCEPTION. Was taken by the plaintiff to a refusal of the instruction, that if defendants wrongfully took possession of the work and expelled the plaintiff therefrom on the 6th of November, 1845, and by their acts on that day annulled the the contract, the plaintiff can recover in this action.

5TH EXCEPTION. This was taken by the plaintiff to the rejection of his prayer, that if the agent of the company did not make, or intend to make, the monthly estimates referred to in the agreement accurate, but only approximate, then said estimates are not final and conclusive on the plaintiff, but he may show from other testimony the true amount of the work done up to the 6th of November, 1845.

The verdict and judgment was for the defendants and the plaintiff appealed.

The cause was argued before SPENCE, MAGRUDER, and FRICK, J.

By MCKAIG for the appellant, and

By GEORGE W. PEARRE for the appellees.

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The several bills of exception and prayers indicate the points urged in argument.

FRICK, J., delivered the opinion of this court.

On the 14th of April, 1845, the plaintiff entered into a contract with the defendants for graduating a section of rail road, at certain stipulated prices for the several kinds of work to be done, engaging to complete it on or before the 1st day of October of the same year.

In the contract is a stipulation, that during the progress of the work and until it is completed, there shall be a monthly estimate made by the agent of the defendants of the quantity, character and value of the work done during the month, *four-fifths* of which value shall be paid to the plaintiff at the office of the defendants in the town of *Cumberland*, and when the work is completed and accepted by the agents of the company, there shall be a final estimate, when the value appearing to be due to the plaintiff, shall be paid; the said monthly estimates to be taken as conclusive between the parties.

The work was commenced by the plaintiff in fulfilment of the contract, and it is in evidence that during the progress of it, monthly estimates as provided were regularly made from actual measurements by the agent of the company, and the plaintiff regularly appeared at the office of the defendants, and received the payments from them under, and with reference to, said estimates, abating the twenty per cent., which was reserved for the final completion of the work. The payments were made to the plaintiff up to the 29th of October 1845, and the work was prosecuted by him until the 6th of November following, when the defendants entered upon the work, and gave notice to the superintendents and laborers engaged upon it, that they intended thenceforth to conduct the work in their own names, and pay the persons so employed upon it themselves. The workmen thereupon suspended work under the plaintiff and accepted service with the defendants, who sent an agent of their own appointment upon the premises to take charge of the work, and the plaintiff protesting to this agent against this for-

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cible act of the company, abandoned the work ; and after that day it was conducted and completed by the defendants. This right to rescind the contract and discharge the plaintiff from the work, the defendants claim under the further stipulation in the contract; that in case the plaintiff should not from time to time fully comply with all the terms of the contract, or if it should appear to their agent that the work does not progress with sufficient speed, or in the case of interference with the work by legal proceedings, the defendants should have power to annul the contract upon giving to the plaintiff *three days' notice*, in writing to that effect, in which case the unpaid value of the work done shall be forfeited by the plaintiff. And this right to annul is further declared to be *not mutual*, but to be exercised only by the defendants.

Hereupon the plaintiff has instituted this action for work and labor done and materials found. The declaration contains the usual common counts, and at the trial of the cause he offered evidence of the value of the work done, upon which value he claimed to recover.

The defendants to repel their claim offered in evidence the special agreement, insisting that the plaintiff having excluded himself from the right to rescind the contract, his remedy for any breach on the part of the defendants, was by an action on the contract, and not upon the general counts; at all events, that he cannot recover in this form, but for the balances, if any remaining due to him under the monthly estimates during the progress of the work done by him, exclusive of the twenty per cent. of said estimates retained by the defendants.

We are to inquire whether the acts of the defendants in the premises discharged the plaintiff from his obligations under it, and if so, whether he can maintain his action in this form?

By the peculiar and one sided character of this contract, the right to rescind it is reserved to one party alone. That right however, is not open to a capricious exercise of it, but the contract expressly specifies the grounds upon which alone he is at liberty to abandon it. Without again recurring to them or searching for the reasons that prompted the acts by

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which the plaintiff was driven from the work, it is enough to know that the defendants failed to give the stipulated notice in writing, and without any cause assigned, entered upon the work and expelled the plaintiff. The only imaginable pretext that the record would justify, is that the plaintiff failed in the time to which he was restricted and thus offered a legal justification for the acts of the defendants. But no such pretext is alleged. On the contrary the work was continued by the plaintiff, and payments made after the 1st of October, and the question would still be open before the jury, whether by continuing to operate upon the work under the contract, and under the supervision of the plaintiff's agents, this actual breach of the contract had not been waived by the defendants?

It is not however material to inquire whether the defendants rescinded the contract upon any of the grounds that authorized it. They failed to give the notice to which the plaintiff was entitled. They broke the contract by a forcible entry upon the works without cause shown to the plaintiff, and in either case repudiated and annulled the contract by their own mere act of volition. Is the plaintiff then further bound by its stipulation or is he not also at liberty to abandon it? Though one party alone has reserved the right to arrest the work, when he does so and excludes the other by force from further compliance, is it too much to say that he is discharged from all further obligation under it, and may treat it as a mutual abandonment? If one party rescinds the contract, how can it be said to subsist as regards the other? The stipulation that the right to annul is not mutual, must mean that the defendant in any state of things, however disadvantageous, may hold the plaintiff to his contract, while for causes alleged the defendant is free to break it. But it certainly means further, that if the defendant exercises his privileges, *it is then broken*. Because once repudiated by the defendant, it cannot bind one and not the other. And the party thus injured by the abandonment of the contract is not bound to resort to his special action, but may rely upon the implied legal liability of the other to compensate the services rendered, and may claim the adjustment in *inde-*

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bitatus assumpsit upon the basis of the work which he has actually performed. To defeat this, the defendant cannot be allowed to set up the special contract, which he was the first to violate and abandon. It would be manifestly unjust to allow him to do so, nor is it sanctioned by any principle of law or of pleading.

“Where there is a special contract, and the plaintiff has performed a part of it according to its terms, and has been prevented by the act or consent of the defendant from performing the residue, he may in general *assumpsit* recover for the work actually performed, and the defendant cannot set up the special contract to defeat him,” *Smith’s Leading Cases*, 44 *Law Lib.*, 25, and cases cited in note 4.

All the authorities agree that by putting an end to the contract by one party, it must be considered as abandoned by him and if his acts in so doing are such as necessarily to prevent a performance on the part of the other, the whole contract must be considered as rescinded, and the other party may resort to his *quantum meruit*.

The question now is, what is the effect of this doctrine upon the particular contract now before the court, and what is the measure of indemnity by which the plaintiff is to recover? He has received payments or at least adjusted monthly accounts upon the basis of settlement prescribed by the contract. Are these adjustments obligatory upon him, or is the contract open in its entirety to claim, as he does here, the fair and full value of his work, independant of the prices regulated by the contract?

It would seem that where the agreement contains a number of distinct stipulations, which admit of being separately executed and closed, each is taken distributively and considered as forming the matter of a separate agreement after it is so closed. See *Smith’s Leading Cases* above, and the case there cited, *Sickles vs. Puttison*, 14 *Wend.*, 257.

By the contract before us, payments are to be made at stipulated periods according to the amount of work performed. The plaintiff was not required to perform any given amount

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of work in each month, but whatever was performed by him, was to be measured and estimated by the prices fixed and closed by a payment to the plaintiff. It is true that twenty per cent. is reserved in the hands of the defendants, dependent upon the conditions in the contract, looking to the completion of the work. But that reservation can in no wise affect the principle of adjustment adopted by the parties themselves. The contract being in its terms divisible, and the consideration likewise, it is obvious that a separate *assumpsit* arises, and an action could be sustained at each of these monthly periods respectively, upon the adjustments of the work done and the estimate of the agent of the defendant's excluding the twenty per cent. reserved for ulterior settlement. But when the contract is annulled and the plaintiff is excluded from the performance, the amount so reserved becomes part of the arrears of the monthly payments to which he is as much entitled as if he had been permitted to complete the contract. It is released from the conditions under which it was retained by the act of the defendants themselves, and forms part of the amount which the plaintiff has earned under the monthly estimates made by the agent of the company. And upon the action of *indebitatus assumpsit* which arises to the plaintiff by the defendant's breach of the contract, the plaintiff is entitled to include it as an amount expressly admitted to be due to him, upon adjustment of the monthly accounts. He is concluded by these settlements, and by reason of their being closed as distinct and separate portions of the contract, he cannot open them again to prove and recover the actual value of his work. His claim has in fact been liquidated upon the quantity of work done and the value ascertained by the prices in the contract, and he is effectually barred by adopting the adjustments and receiving payments under them. The partial payments bind him to the whole settlement. And so far as the work has been ascertained and adjusted under the contract, he is entitled to recover only the balance upon the basis of these settlements, whatever may remain in arrear including the twenty per cent. For by the defendant's own proceeding he has released all claim to this forfeiture, as by his act the

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plaintiff was deprived of the means and opportunity to comply with his contract, and this twenty per cent., thus becomes part of the money earned by the plaintiff under it.

This is the rational and legal interpretation of these adjustments. So far however, as work has been performed that remains unadjusted between the parties, the plaintiff is at large upon his *quantum meruit*, and is at liberty to prove the actual value of such work. Here the rates of compensation stipulated by the contract are no longer binding upon the parties. They constitute but an element in the proof, proper to go to the jury as *prima facie* evidence of value, leaving it still open to the parties to show how this average standard of prices agreed on, ought to be more or less, according to the difficulties and value of this particular portion of the work, in comparison with the other portions. In relation to this part of the case, they are not to be considered as arbitrary or conclusive. *Smith's Leading Cases*, 44 *Law Lib.*, 30.

With these principles controlling the case, we proceed briefly to apply them to the respective prayers submitted by the parties.

Upon the 1st and 2d prayers of the plaintiff, we think the evidence of *Jeanpierre* was improperly excluded by the court. The plaintiff had proved by a competent witness the value of the work, from an estimate and calculation of his own, independent of the prices fixed by the contract; and then offered to prove, that from the inaccessible character of the country, and the want of accommodation for laborers, the work involved preparatory labor and additional difficulties, which necessarily enhanced the value of the work done by the plaintiff; and we can see no good reason for rejecting it. It was a fair and proper subject of consideration before the jury, in this form of action, and the character of the evidence seems to us, sufficiently apparent on the face of the prayer, without further explanation of its object and tendency. It was intended to present to the jury, the particular difficulties that increased the labour and enhanced the value of the work. The special agreement had not then been produced, and the views here taken under the adjustment, were not in the way of the evidence as offered. And

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so far as it applies to the unadjusted portion of the work, it must still be considered good and competent evidence. What particular weight it may be entitled to before a jury, we are not to say. We think it was legitimate evidence, and as such, ought to have been submitted to them.

The defendants then having offered in evidence the special agreement, and proved by the agent of the company, that the monthly estimates were made by him, from actual measurements by himself and his assistant, and that upon all the estimates, payments had been received by the plaintiff; the plaintiff proved, that on the 6th day of November, the defendants entered upon the works, and without notice or reason assigned, assumed the direction of them, and refused to allow the plaintiff to proceed. And the defendants hereupon, prayed the instruction of the court:

1st. That the plaintiff cannot recover under this declaration for said work and labor, except for the balances, if any, remaining due under the monthly estimates, made by the agent during the progress of the work, *exclusive* of the twenty per cent. of said estimates, retained by the defendants; and

2d. That by the terms of the contract, the plaintiff deprived himself of the right to rescind the same, and that his remedy for any breach of it, is by suit upon the contract; and that he cannot recover under this declaration for any work or labor, or other service performed, without showing an annulment of it, by the express agreement of both parties, which instructions the court gave to the jury.

It has been already said, that under the circumstances, and in this form, the plaintiff may not only recover the balances due on the monthly statements of the work adjusted, as well as the value of the work unadjusted, but also the twenty per cent. retained in the hands of the defendants; the first prayer of the defendants ought, therefore, to have been rejected. We have also said, that the defendants having rescinded the contract by their own act of force, and without notice, the right to sue in this form, was open to the plaintiff; because by this unlawful exercise of the right reserved to them, the contract was at an

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end, and there could be no necessity to show an express agreement of the one, to ratify the wrongful act of the other party. It is enough, that the plaintiff was not notified or consulted, and that the defendants terminated the contract by their own arbitrary and capricious action, and left the plaintiff no other alternative, than to acquiesce and seek his remedy at law. There is, therefore, error in both these instructions of the court.

The third instruction asked by the plaintiff, relates to the form of action, resulting from the expulsion of the plaintiff from the work, and the wrongful possession by the defendant, which we have before determined was under the facts in the cause, properly an action for work and labor, &c., and consequently, the court erred here, also, in refusing to grant it.

The fourth instruction asked by the plaintiff, was to reject the monthly estimates, as not final and conclusive; because the *measurements* were not actually made by the agent, and because he did not intend to make these monthly estimates accurate; which the court properly refused; because there is no evidence, that he did not intend them to be accurate. On the contrary as proved by him, they were made from actual measurements, which were returned to the office of the defendants, and the plaintiff regularly appeared there and received the payments under, and with reference to these estimates.

The judgment must be reversed, and the cause returned to the county court.

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JUDEMENT REVERSED, AND

PROCEDENDO AWARDED.

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**SAMUEL GRINDER, MICHAEL GRINDER, JACOB GRINDER
AND JOHN BAUGHER, SURVIVING OBLIGORS OF JOHN
GRINDER, vs. ROBERT NELSON.—December 1850.**

A general demurrer brings before the court the whole record, and judgment will be rendered thereon against the party who commits the first vice or imperfection in pleading.

In all cases susceptible of doubt and where a statute is open to interpretation it is to be construed to operate prospectively, but where a statute either by express provision or necessary implication is retroactive the rule does not apply,

The act of 1845, ch. 352, which declares "that in any suit or action hereafter to be brought in any court of law or equity in this State upon any bond or contract," &c. the party who seeks to plead the usury act of 1704, must specially plead the same, and set out in his plea the sum actually due with legal interest. is retroactive as to contracts made before its passage, and is not for this reason unconstitutional or void.

It is incumbent on those who assail a statute on the ground of its invalidity to make out a clear case of legislative usurpation.

An *ex post facto* law within the meaning of the constitution of the *United States*, relates to crimes and has no application to private rights or civil remedies.

The act of 1845, cannot be regarded as violating the obligation of any contract: so far as it operates upon the contract of loan, it upholds and sustains it in part.

A State law, though it may divest by its retroactive operation, vested rights, is not for this reason to be treated as an infraction of the constitution of the *United States*.

The constitution of the *United States* does not prohibit the States from passing retrospective laws generally, but only *ex post facto* laws, and laws impairing the obligation of contracts.

The 15th article of the bill of rights of this State only forbids retrospective criminal laws, meaning *ex post facto* laws, and is a recognition of the right of the legislature to pass retrospective laws relating to civil cases and contracts.

A statute which by its retrospective operation divests vested and valuable rights, is, in the absence of any express prohibition in the constitution of the *United States*, or of this State, unauthorized and void, as arbitrary and violatory of the first rules of right and justice, and contrary to the fundamental principles of the social compact.

Under the act of 1704, a party could in equity obtain relief against an usurious contract only by paying or offering to pay the principle sum with legal interest.

Neither could the borrower maintain an action of trover at law, under this act of 1704, to recover goods hypothecated to secure an usurious debt, unless he tendered the amount actually loaned.

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If a borrower has paid money on an usurious contract, neither law nor equity will enable him to recover more than the excess paid beyond the principal and lawful interest.

The borrower is at all times and under all circumstances under a moral obligation to pay, or tender, the sum actually loaned with legal interest as a fair compensation for its use.

The act of 1845, only compels the borrower, who as a *defendant* seeks to protect himself against a usurious contract, to do precisely what he was before obliged to do when he stood in the position of *plaintiff*.

In this view this act is plainly remedial, the exercise of legislative authority over the subject of remedies, a power which unquestionably may be exercised at pleasure, in relation to past, as well as future contracts.

An act which divests a right through the instrumentality of the remedy, and under the pretence of regulating it, is as objectionable as if aimed at the right itself.

But the vested rights thus guarded are those only to which a party may adhere, and upon which he may insist without violating any principle of sound morality; there can be no vested right to do a wrong, or violate a moral duty, or resist the performance of a moral obligation.

A borrower can have no *right* as a matter of private justice, to repudiate his contract, so as to escape from the payment of the sum actually received.

The act of 1845, ch. 352, is free from objection, and is to be enforced as a valid exercise of legislative power.

APPEAL from *Frederick's* county court.

This was an action of *debt* brought by the appellee against the appellants on the 4th of September 1846, upon a single bill executed by the latter on the 11th of April 1840, for \$350, payable to the appellee twelve months after date. *Baughner* one of the defendants appeared and pleaded several pleas of usury under the act of 1704. To these pleas the plaintiff replied, that there was at the commencement of the suit, and still is due on the said single bill, \$350, the principal actually loaned with interest at six per cent., wherefore he prays judgment upon such principal sum and interest, to be ascertained by a verdict of a jury to be found under, and according to, the act of 1845, ch. 352, passed the 10th of March 1846.

To this replication the defendant, *Baughner*, demurred, but the court overruled the demurrer and rendered judgment for the plaintiff for the amount of the single bill, and damages and costs, from which the defendants appealed.

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The cause was argued before SPENOE, MAGRUDER, MARTIN and FRICK, J.

F. A. SCHLEY for the appellants, contended.

1st. That at the time the contract was made, it was tainted by usury, and that as the law then existed, and the right of the appellant under the law, there was *vested* in him the *right* to declare the contract void, as usurious, and there was no legal obligation on his part to perform it, and no legal right vested in the appellee to enforce it.

2nd. That the act of 1845, having been passed long after the contract was made, and after the right of the appellant was vested, to repudiate the contract and relieve himself from it, and all obligation under it, it was not competent for the legislature to pass a law so to operate upon this contract, and the rights of the appellant under it, as to divest the appellant's right, set up the contract anew, engraft upon it new rights on the part of the appellee, and create new obligations on the part of the appellant, not existing at the time of the contract, and that, therefore, the appellee cannot call to his aid the provisions of this act of Assembly, to enforce his claim against the appellant, who is a mere security, and as such viewed by the law.

JOS. M. PALMER for the appellee, made the following points.

1st. On the general demurrer to the plaintiff's replication, the court will examine and consider the whole record and mount up to the first defect in substance, and give judgment against the party whose pleadings are first substantially defective.

2nd. The defendant's (*John Baughner*,) plea of usury in bar of the action, is defective in substance, and bad on general demurrer, it not being pleaded in the form and manner required and directed by the act of Assembly of 1845, ch. 352.

3rd. The plaintiff's replication is substantially correct, upon which an issue of fact ought to have been framed, to try by a jury said issues, to ascertain the actual sum of money fairly due upon the said bill obligatory as having been actually loaned,

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&c. with interest thereupon at the rate of six per cent. per annum, according to the provisions of said act of 1845, &c.

4th. The main question for the consideration of the court upon the pleadings in this case, is, whether the passage of the act of 1845, ch. 352, was a constitutional exercise of legislative power, so far as it concerns pre-existing contracts, &c. The appellee insists that the act does not, in any way, conflict with the constitution of the United States, or the constitution of this State.

MARTIN J., delivered the opinion of this court.

In this case an action of debt was instituted in *Frederick* county court on a single bill, executed on the 11th of August 1840, by which the appellants stipulated to pay to the appellee the sum of \$350, with interest, from the date of the note. It appears from the record that *John Baughner*, one of the appellants, appeared in court, and pleaded in bar of the action the statute of usury of 1704, chap. 69, in force at the time this loan was made and the contract created. This suit was instituted on the 4th of September, 1846, and to this plea in bar of the action upon the ground of usury, the plaintiff filed a replication, in which he averred that the suit was brought to recover the sum due on the note, with legal interest thereon, and prayed judgment for such sum as might be ascertained by a jury to be fairly and actually due, in conformity with the provisions of the act of Assembly of 1845, chap. 352. To this replication a general demurrer was interposed. Judgment was rendered upon this demurrer, in favor of the plaintiff, and upon an appeal from this judgment of the county court, the case has been brought here for our examination and revision.

We have already stated, that the plea filed in this case by the defendant, was grounded on the usury act of 1704, chap. 69, If that act is to be treated as unrepealed, and in force with respect to this particular transaction, then the plea must, of course, be held as an absolute bar to the action. If, on the contrary, the act of Assembly of 1704, chap. 69, is to be considered as abrogated with reference to this contract, by the act of 1845,

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chap. 352, then the plea is defective, as it does not conform to the provisions of the latter statute; and judgment would be rendered upon the general demurrer, which brings before the court the whole record, against this plea, as containing the first vice or imperfection. *Morgan vs. Morgun*, 4 Gill and John., 398. *State vs. Nicols*, 10 G. & John., 27. It is apparent, therefore, that the controversy in this case rests entirely upon the legal sufficiency of this plea. A question, the solution of which depends upon the further questions, whether the act of 1845, chap. 352, is to be interpreted as embracing this particular case; and if so, whether it is to be enforced by the courts as a valid and constitutional act within the range and scope of the legislative power?

The point made by the counsel for the appellant, that this act is to be constructed by the court as prospective in its operation, and intended by the legislature to apply only to such contracts as were created after its enactment, cannot be maintained. The wisdom and inherent justice of the rule which declares that, in all cases susceptible of doubt, and where the statute is open to interpretation, it shall be so construed as to operate prospectively, is admitted to its utmost extent. It is founded upon the presumption, that the legislature did not intend to make a new rule for past transactions. *Nova constitutio futuris formam debet imponere non præteritis*. But this general principle, salutary and well established as it is, as an element of jurisprudence, can have no application to a case where the legislature have declared, in language too express and plain to be mistaken, that they designed to give to the statute in question, a retroactive operation. In such a case there is no room for interpretation. Whether an act possessing this retroactive character is to be condemned as an unconstitutional and unauthorised exercise of legislative power, is another question; but nothing can be more clear than that so long as this act is recognized as a valid and operative statute, it must be enforced in accordance with the will of those who created it. In the case of *Goshen vs. Stonington*, 4 Conn. Rep., 220, the Supreme court of Connecticut, when speaking upon this subject, said:

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“It must be admitted, that by construction, if it can be avoided, no statute should have a retrospect anterior to the time of its commencement. This principle is founded on the supposition that laws are intended to be prospective only. But when a statute, either by explicit provision or necessary implication, is retroactive, there is no room for construction; and if the law ought not to be effectuated it must be on a different principle.”

This is the predicament of the act of 1845, chap. 352. It was passed on the 10th of March, 1846, and declares, “that in any suit or action hereafter to be brought in any court of law or equity in this State, upon any bond, &c., or upon any contract, &c., whether the same relate to the loan of any money, &c., in which any person shall seek to avail himself of the provisions of the act of Assembly of 1704, it shall be incumbent on such person specially to plead the same, and in such plea to set out the sums, both principle and interest, actually and fairly due on such bonds, &c., estimating the principal debt actually loaned or contracted for, with interest thereupon, at the rate of six per cent. per annum.” The expressions of this statute are too clear and explicit for dispute. There is no room for construction. The language of the act is, “that in any suit hereafter to be brought,” &c. That is, in any suit brought after the 10th of March, 1846, it shall be incumbent on the defendant to plead as required by its provisions. This action was instituted on the 4th of September, 1846, and it is impossible to do otherwise than determine that this case is covered by the act of 1845, although the note in controversy was executed many years before its enactment.

The next question presented for our examination is, whether the act of 1845, assuming it to be retrospective in its character, is to be treated as an unconstitutional exercise of legislative power, so far as it operates upon pre-existing contracts? Questions of this kind are always regarded by the courts as the most important that can be submitted for their adjudication. It is certainly the attribute of the judicial tribunals in this country, to annul an act of the legislature when it is manifest to the

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courts, that in passing it, the legislature have violated, or abused the powers granted to them by the people. But this high power is to be exercised with the most guarded circumspection and care. An act emanating from a co-ordinate branch of the government is presumed to be valid. And all agree that it is incumbent upon those who assail a statute on the ground of its invalidity, to make out a clear case of legislative usurpation. We proceed to inquire if this act is obnoxious to the objections which have been urged against it.

We did not understand the counsel for the appellant as contending that this act was to be considered as unconstitutional upon the ground of its repugnancy to the 10th section of the 1st article of the constitution of the United States, prohibiting the States from passing *ex post facto* laws, or laws impairing the obligation of contracts. There certainly could be no foundation for such a proposition. This law, although retroactive in its character, has none of the characteristics of an *ex post facto* law, as that phrase was understood by the convention who framed, and the people who adopted the federal constitution. An *ex post facto* law relates to crimes, and has no application to private rights or civil remedies. *Calder vs. Bull*, 3 *Dal.*, 386. *Fletcher vs. Peck*, 6 *Cranch*, 187. It is equally clear, that the statute in question cannot be regarded as violating the obligation of any contract. There is no contract invaded by it. So far as it operates upon the contract of loan, it upholds and sustains it in part. *Andrews vs. Russel*, 7 *Blackford*, 475. And it is now established, by the adjudications of the Supreme Court, that even if this act could be regarded as divesting, by its retroactive operation, vested rights, it would not, for that reason, be treated as an infraction of the constitution of the United States. *Satterlee vs. Matthewson*, 2 *Pet.*, 413, *Watson vs. Mercer*, 8 *Pet.*, 110. *Charles River Bridge vs. Warren Bridge*, 11 *Pet.*, 540.

In *Satterlee vs. Matthewson*, 2 *Pet.*, 413, the court said:

“The State law is said to be retrospective. Be it so; but retrospective laws, which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not

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condemned or forbidden by any part of the constitution of the United States.”

In *Watson vs. Mercer*, 8 *Pet.*, 110, the court declared, that they had no power “to pronounce an act of the State legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property, The constitution of the United States does not prohibit the States from passing retrospective laws generally, but only *ex post facto* laws.” The principles thus enunciated, were quoted with approbation, and reaffirmed by *Mr. Chief Justice Taney*, in delivering the opinion of the court in the case of *Charles River Bridge vs. the Warren Bridge*, 11 *Pet.*, 540.

It is impossible to maintain that the act of 1845 can be considered as violating any of the prohibitions or restrictions on the legislature, to be found in the bill of rights, or constitution of the State of *Maryland*. In the bill of rights, art. 15, it is declared, “that retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore, no *ex post facto* law ought to be made.” This article, by its very terms, is confined to retrospective criminal laws, meaning *ex post facto* laws. It is a recognition of the right in the legislature to pass retrospective laws, so far as they relate to civil cases and contracts. *Expressio unius exclusio alterius*. Our books of statutes are filled with retrospective laws, healing imperfect deeds, or validating defective acknowledgments, which have been rarely impeached, and when assailed, have been invariably sustained by the decisions of the courts.

The counsel for the appellant has, however, contended, that at the time this contract was made, it was tainted with usury; and that, as the law then existed, there was vested in him the right to declare the contract void, as usurious, and to repudiate it; that, by the act of 1845, he has been divested of this right; that a statute thus retrospectively divesting him of a vested and valuable right, was an arbitrary act, violatory of the first rules of right and justice, and contrary to the fundamental

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principles of the social compact; that an act of this character, is not in the nature of legislative power, and that it is, therefore, to be treated as unauthorized and void, in the absence of any express prohibition to be found against it in the constitution of the United States, or in the constitution of this State. 3 *Dal.*, 388, 6 *Cranch*, 135. 9 *Gill & John.*, 408.

The argument on this point was pressed upon the court by the counsel with great force and ingenuity. We have carefully considered it, and think, that when the rights of the borrower and lender of money on a usurious contract, as they existed under the usury act of 1704, ch. 69, are carefully examined, it will be seen that it is impossible to view the act of 1845 in any other light than as regulating the remedies with respect to such contracts, and in thus modifying and altering the remedy to impose upon the usurious borrower, as a condition on which alone he is to be relieved from the payment of the excessive interest, the performance only of a moral duty, from the discharge of which, no correct man should seek to escape.

In *Trumbo vs. Blizzard*, 6 *G. & J.*, 18, the Court of Appeals, following in this respect the line of the *English* adjudications, determined that a mortgagor who goes into a court of equity seeking to be relieved against a usurious mortgage, will only be heard on the condition that he does himself what is equitable and just, by paying or offering to pay the principal sum with legal interest. *Scott vs. Nesbit*, 2 *Bro. C. C.*, 641.

The same principle is reiterated by the court in *Gordon vs. Trumbo*, 6 *Gill and John.*, 105, on a bill filed by a mortgagor praying discovery as to the usury. The court said "it is a principle well established in pleading in equity, that he who goes into a court of equity to be relieved against his usurious contract, must, in his bill, tender and offer to pay the principal and interest legally due, and confine his claim to the equitable interposition of the court to the usurious excess only."

The doctrine thus enunciated in the cases to which we have referred, is not confined to the courts of equity. It prevails

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also in the legal tribunals. And we therefore find the court in deciding in *Lucas vs. Lutour*, 6 Har. and John., 100, that an action of trover could not be sustained by the borrower to recover the value of goods hypothecated to secure a usurious debt, unless the plaintiff had tendered the amount actually loaned. It also established that if the borrower has paid money upon a usurious contract, both the courts of law and equity will enable him to recover back the excess paid beyond the principal and lawful interest, but not further.

The doctrine announced in the cases to which we have adverted, stands upon the principle that the borrower is at all times and under all circumstances under a moral obligation to pay to the lender the sum actually loaned with legal interest, as a fair compensation for its use. When a borrower appears in a court of law or equity as a suitor seeking to be relieved from a usurious contract, he will not be heard except on the equitable condition that he pays to his creditor the sum actually and fairly due after deducting the illicit interest, and it is very clear that when the borrower stands before the court in the attitude of a defendant, he is not subject to the same rule which is applied to him when he holds the relation of plaintiff, because in this predicament of the case, the courts have no authority to force upon him the performance of this moral obligation, consistent with the powers, remedies and rules of pleading, by which they are governed in the administration of the law.

What then does the act of 1845 profess to accomplish? The legislature in the exercise of its remedial authority, comes to the aid of the courts and declares that the borrower, who as a defendant, seeks to extricate himself from a usurious contract, shall do precisely what he is obliged to perform, when he asks to be protected against it in the position of a plaintiff. In this respect the statute is plainly remedial. It is no more than the exercise of the legislative authority over the subject of remedies. A power which the legislature may unquestionably exercise at pleasure in relation to past as well as future contracts. *Bronson vs. Kinzie*, 1 How. Rep., 315. *Butler vs. Palmer*, 1 Hill, 324.

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It may be said, however, that admitting this statute to be remedial in its form, yet the thing to be protected is the vested right. And that an act which divests a right through the instrumentality of the remedy and under the pretence of regulating it, is as objectionable as if the shaft was levelled directly at the right itself. The proposition is certainly true in reference to cases to which it is applicable. But in this case no vested right was divested. When vested rights are spoken of by the courts as being guarded against legislative interference, they mean those rights to which a party may adhere, and upon which he may insist without violating any principle of sound morality. In the language of *Judge Duncan* in *Satterlee vs. Mathewson*, 16 *Sarg. and Raw.*, 191, "there can be no vested right to do wrong." In the nature of things, there can be no vested right to violate a moral duty, or to resist the performance of a moral obligation. And although a borrower may be justified in morals as he is in law in resisting the payment of illicit interest extorted from him while he was *in vinculis*, and in consequence of his necessitous condition, he certainly can have no right as a matter of private justice, to repudiate his contract so as to escape from the payment of the sum actually received.

We are perfectly satisfied that this act of Assembly is free from objection, and is to be enforced as a valid exercise of legislative power. We think, therefore, that the judgment of the county court must be affirmed.

There is no force in the objection that the judgment rendered in this case was defective, as not conforming to the replication. The plea in which usury was alone set up as a matter of defence, was bad, as it was not in conformity with the act of 1845, ch. 352. There was therefore in the case no plea, and the plaintiff was entitled to the sum claimed by him in his declaration. The action being founded on a bill obligatory, the intervention of a jury was entirely unnecessary.

JUDGMENT AFFIRMED.

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ELIAS YINGLING, vs. JOHN H. HOPPE.—*December* 1850.

To an action of false imprisonment, the defendant pleaded in justification, that he was sheriff and arrested the plaintiff by virtue of process; to this plea the plaintiff replied, that when so arrested he tendered a bail piece to defendant, which the latter refused to accept. **Held**, that this replication was faulty, and could not be sustained.

A general demurrer opens not only the pleading demurred to, but the entire record, and judgment will be given against the party who commits the first fault: but there is an exception to this rule, where the replication to an insufficient plea, is not only defective in matter, but also shows that the plaintiff has no cause of action.

A plea justifying the arrest or imprisonment of the plaintiff, on the ground that defendant was sheriff at the time, need not answer such matters set out in the declaration, as would have given the plaintiff a good cause of action against a private person.

The plea of *son assault demesne* to a declaration from an assault and battery, need not traverse such matters alleged, as that "of his life it was greatly dispaired."

The absence of an *absque hoc*, or a *protestando*, or the want of an averment, that the trespass justified, is the same trespass that is complained of, cannot be taken advantage of on general demurrer.

A plea must either deny the cause of action or confess and avoid it, and if it do not confess the cause of action, the plaintiff may demur specially for that cause.

The fact traversed, should be so material and essential a part of the cause of action or defence, as denying it with success, will destroy the cause of action or defence.

Matters of aggravation need not be answered by the plea, and the plaintiff in a case like this must rely upon them in his replication, or there must be a new assignment.

APPEAL from *Carroll* county court.

The appellant, (the plaintiff below,) brought his action against the appellee, (the defendant below.) The declaration contains two counts. The 1st charges that the defendant, on, &c., with force and arms, at, &c., made an assault upon the plaintiff, and seized and forcibly pulled and dragged him out of a certain store house at, &c., and forced and obliged him to go to the court house at, &c., and then and there imprisoned him and kept and detained him in prison without reasonable

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cause, for the space of four months, whereby the said plaintiff was greatly hurt and injured in his credit, &c. 2nd. That defendant made an assault upon the plaintiff, and beat, bruised, and ill treated him, and imprisoned him, and kept him in prison without reasonable cause for ten days, and wrongfully compelled him under terror of further imprisonment, to find securities and execute a bail piece, contrary to the laws of the State, and other wrongs to the said plaintiff did, to his damage in the sum of \$2000, for which he sues, &c.

The defendant pleaded two pleas: 1st *Not guilty*, and 2nd, a plea of *justification*, averring that at the time of the supposed trespass, he, (the defendant,) was sheriff of *Carroll* county, and arrested the plaintiff by virtue of a *capias ad respondendum*, issued out of said county court, and detained him in custody for one hour, part of the time alleged in the declaration, as it was lawful for him to do. The plaintiff joined issue on the first plea, and filed a replication to the second, averring that when the plaintiff was arrested by defendant in virtue of said writ, he offered sureties of common bail, and to give a bail bond with security for his appearance to the writ, which defendant refused to take, and unjustly and with force of arms detained him in custody, and did falsely imprison him until he was compelled to give special bail to obtain his release, all of which defendant had no right to do, and was an abuse of the process referred to in defendant's second plea.

To this replication the defendant demurred generally, which the court sustained and rendered final judgment thereon for the defendant, and that the plaintiff pay \$4.93½ costs. From this judgment the plaintiff appealed.

The cause was argued before SPENCE, MAGRUDER and MARTIN, J.

PALMER, for the appellant, made the following points:

1st. The defendant's second plea is radically defective in this, that it does not answer the whole declaration and the charges therein contained; it does not pretend to answer or

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justify the battery and wounding, nor the whole time charged of the unjust false imprisonment, &c.

2nd. On the demurrer the court will consider the whole record, and mount up to the first defect in substance, and give judgment against the party whose pleadings are first defective.

3rd. The plaintiff's replication is a good, legal, and valid reply to the second plea of the defendant as pleaded, upon which judgment ought to have been given for the plaintiff upon the demurrer.

DANIEL M. THOMAS and McLEAN, for the appellee, insisted:

1st. The second plea is good, because it answers the gist of the plaintiff's action.

2nd. If it be not good, it is so defective as to work a discontinuance of the action, on the plaintiff's replying to it, instead of taking judgment.

3rd. The replication is insufficient, because it is double;—because it is a departure;—and because it shows that the plaintiff has no remedy by this form of action.

4th. On the facts admitted by the pleading, the plaintiff has no remedy in this form of action, and the court will not send the case back: no matter whether they find the first slip to have been made by the plaintiff or defendant.

MAGRUDER, J. delivered the opinion of this court.

This action was brought by the appellant in *Carroll* county court. It is certainly an action of trespass *vi et armis* and brought to recover damages done to the person of the plaintiff. It is to be regarded as an action of assault and battery, or perhaps rather of false imprisonment.

The second plea is a plea of justification, and tells us that the defendant was at the time the sheriff of the county, and had in his hands process which required him to arrest the plaintiff. The replication certainly is faulty: it finds the plaintiff's cause of action in a refusal by the defendant to take a bail piece when the plaintiff offered one to him.

The replication, it is not attempted to sustain, but the defendant having demurred to it, this demurrer we are told, has

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the effect of opening to the court, not only the pleading demurred to, but the entire record, and judgment will be given against the party who commits the first fault. It would seem however, that there is an exception thereto to wit: when the replication to an insufficient plea is not only defective in matter, but also shows that the plaintiff has no cause of action. *Gould on Pleading, ch. 9, sec. 39.*

There are no doubt, many objections to this plea, if they had been made in the form of a special demurrer. But the plaintiff has put in a general demurrer, which prevents him from taking advantage of defects which have been noticed in the argument.

In an action of assault and battery, or false imprisonment, there will be usually found in the declaration many matters of aggravation, which it cannot be necessary to notice in a plea of justification. To a declaration for an assault and battery, if the defendant pleads *son assault demesne* he need not traverse such matters alleged, as that "of his life it was greatly despaired," so if he justify the arrest or imprisonment of the plaintiff, alleging himself to have been sheriff at the time, he need not answer such matters set forth in the declaration, as would have given the plaintiff a good cause of action, if the acts complained of, had been the acts of a private individual.

An *absque hoc*, or a *protestando*, in the proper places, certainly would improve this plea, but then the objections to be taken must be such as the party taking them, may avail himself of upon a general demurrer.

The most important omission perhaps in this plea, is the want of an averment, that the trespass justified, is the same trespass that is complained of by the plaintiff, yet it is not thought that of this omission advantage can be taken upon this general demurrer.

The authorities tell us that unless there be an estoppel the matter of the plea must be either a denial of the cause of action, or a confession and avoidance of it. See *Archbold's Civil Pleadings*, 200.

After giving us cases in illustration of this, he adds, p. 202.

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“If the pleas do not confess the cause of action, the plaintiff may demur specially for that cause.”

As to other objections which might be made, it may be answered, that although many things alleged ought to be traversed, yet the fact traversed should be so material and essential a part of the cause of action or defence, that denying it with success will have the effect of destroying the cause of action, or the defence altogether. *Archbold*, 187.

Matters of aggravation need not be answered. In a case like this, the plaintiff must rely upon them in his replication or there must be a new assignment.

JUDGMENT AFFIRMED WITH COSTS.

JAMES W. BAUGHER AND OTHERS, EXECUTORS OF ISAAC BAUGHER, vs. SAMUEL DUPHORN, ROBERT ANNAN AND DAVID GAMBLE.—*December 1850.*

A principal in a bond agreed with his sureties, that he would deliver bark taken from the land, for the purchase of which the bond was given to *J. B. & Co.*, and apply the proceeds to the payment of the bond. The payee in the bond assigned it to one of the firm of *J. B. & Co.*, who were not parties to the contract, but afterwards assented that the purchase money of the bark should be so applied; and the bark was sold and delivered to them accordingly. **Held:**

That it was not competent for the principal, and *J. B. & Co.*, to apply the proceeds of the bark to any purpose inconsistent with such contract, without the consent of the sureties.

If *J. B. & Co.* received bark enough to cover the amount of the note, and the assignee assented to the order to pay it, it was paid, and the parties between themselves, cannot afterwards revoke the payment, where the rights of third parties are concerned.

By such payment the sureties are discharged, and their liability cannot be revived by any subsequent arrangement by the principal and *J. B. & Co.*, to give the fund arising from the bark a different application.

This fund was dedicated to the payment of the bond, and the assignee having

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notice of this fact, and assenting to it, the proceeds of the bark in his hands, were applicable to the bond, in the first instance; and as soon as he became its owner, by assignment, the law regards it as paid.

As a general proposition, it is true, that where a contract is made by a principal with a third party, to pay a debt where sureties are concerned, the latter must be parties to such contract, in order to make it binding upon such third party, and irrevocable.

But if such third party has, in any way, assented to the application of the fund to a particular debt, with notice that such direction was given to it to indemnify sureties, or if he receives it with that understanding, he has acquiesced in the agreement, and it cannot be changed without the assent of the sureties.

A security thus given, and a fund thus pledged, must enure, by operation of law, to the benefit of sureties, and cannot be afterwards diverted to their prejudice, and the depository will be bound to apply it as directed, whether the sureties are expressly parties or not.

The assent of *J. B. & Co.*, to apply the proceeds of the bark to the payment of the bond, was sufficient, without their being parties to, or notified of, the contract between the principal and his sureties.

Notice to one partner of a firm is notice to all.

An objection to a witness, on the ground of interest, should be made when the interest of the witness is first disclosed to the party; it must, at least, be made in a reasonable time after it is known.

The evidence of a witness was suffered to go to the jury without objection, and rebutting testimony was offered, and other witnesses examined, and exceptions taken, during all which time, the deed, disclosing the witness' interest, was in the hands of the counsel of the opposite party. **Held:** That, under such circumstances, the objection comes too late.

APPEAL from *Frederick* county court.

This was an action of *debt*, instituted, originally, by *Isaac Baugher*, the testator of the appellants, upon two single bills, for \$450 each, executed on the 23d of February, 1844, by *Samuel Duphorn*, as principal, and the other appellees as his sureties, in favor of *James Wilson*, administrator, *d. b. n.*, of *Frederick Beard*, and payable on the 1st of August, 1844 and 1845, respectively, and assigned by *Wilson* to *Isaac Baugher*, the plaintiff, by assignment in writing, at the risk of the latter, on the 22nd of October, 1844, and 30th of September, 1845, respectively. The pleas and issues are fully stated in the opinion of this court.

1st EXCEPTION. The plaintiffs offered in evidence. the

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single bills in question, the execution of which, with the assignment of them, was admitted. Defendants then offered the depositions of *James Wilson*, the assignee of said single bills, and *John Duphorn*, and the testimony of *John Snouffer*, proving the facts which are fully stated in the opinion. To the testimony of the last witness, who proved that, in July, 1844, when part of the bark was delivered, according to the agreement proved by the other witnesses, to *Joseph Baughers & Co.*, of which firm, *Isaac Baughers*, the plaintiff, was a partner, witness told *Joseph Baughers*, that if we, (the *Duphorns*), were not bound to deliver the bark for the payment of the land, we would not haul you a stick, to which *Joseph Baughers* made no reply, the plaintiffs objected, as irrelevant to the issues, as not showing any connection of *Isaac Baughers* with it. But the court, (MARTIN, C. J., MARSHALL & WEISEL, A. J.,) overruled the objection, and the plaintiff excepted:

2ND EXCEPTION. The plaintiffs then offered rebutting testimony, by *Eli Smith*, that the *Duphorns* received pay for all the bark delivered to *Joseph Baughers & Co.*, by receiving credits on accounts and notes, due by the *Duphorns* to *Isaac Baughers & Co.*, a firm, of which *Joseph Baughers* was not a partner; and that, at the final settlement, nothing was said about the application of the money to the payment of *Wilson's* notes. The bark was paid for by *Isaac Baughers & Co.*, by virtue of orders from *Joseph Baughers & Co.*, upon them. The plaintiffs then offered, in evidence, a deed, executed by the two *Duphorns*, after the institution of the suit, conveying among other property, the land for which the single bills in question were given to the appellees, *David Gamble* and *Robert Annan*, in trust, to pay among other debts, said single bills. Whereupon the defendants asked the instruction first quoted in the opinion, which the court granted, and the plaintiffs excepted.

3RD EXCEPTION. The plaintiffs then asked the instruction, that if a contract did exist between the *Duphorns* and the *Baughers*, that the bark should be delivered to *Joseph Baughers & Co.*, in payment of *Wilson's* notes, to which *Annan* and *Gamble* were not parties, then the *Duphorns* and *Baughers*

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had a right to alter the terms of said contract, and make any other application of the money they pleased, unless it be proved that the *Baughers* had notice of the contract between the *Duphorns* and *Annan* and *Gamble*, referred to in plaintiffs' prayer. The court refused this instruction, and the plaintiffs excepted :

The 4th and 5th exceptions are stated in full in the opinion.

6TH EXCEPTION. After all the evidence was offered to the jury, the plaintiffs objected to the admissability of the deposition of *John Duphorn*, on the ground that he is an interested witness; but the court refused to reject the evidence, and the the plaintiffs excepted, and, the verdict and judgment being against them, appealed to this court.

The cause was argued before SPENCE, MAGRUDER and FRICK, J.

By PALMER for the appellants, and
By RANDALL for the appellees.

The several bills of exceptions sufficiently indicate the points urged in argument.

FRICK, J., delivered the opinion of this court.

Samuel Duphorn, one of the defendants in the court below, had purchased of *John Wilson*, a tract of land for which he gave three bonds with the other appellees as sureties. Two of these bonds constitute the matter in controversy, upon the pleadings and issues in the case, which affirm that they have been paid.

At the time of the purchase of the land, it was agreed between *Samuel Duphorn* and his sureties, that bark should be taken from the land so bought, and should be delivered to *Joseph Baugher, & Co.*, (of which firm *Isaac* was a partner,) the proceeds of which were to be applied to the payment of these bonds. It does not appear that *Baugher & Co.*, were parties to this agreement; but bark exceeding in value the amount of these bonds was delivered to them in conformity

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with the agreement. When the first bond became due, upon application to *Samuel Duphorn* for payment, *Wilson* was referred by him to *Isaac Baugher*, saying that he had received the bark for that purpose, and "he expected him to lift the bond." When *Wilson* called, *Isaac* admitted that bark had been received sufficient to pay the bond, but stated that he had a large account upon other matters against *Samuel Duphorn* and *John Duphorn*, his brother, (who were partners in the bark,) "nevertheless" he said to *Wilson*, "if you will assign the bond, I will pay you the money," *Wilson* accordingly agreed so to assign the bond "at *Isaac Baugher's* risk," who thereupon paid the money. So afterwards, when the second bond became due, *Isaac* called upon *Wilson*, and upon receiving a similar assignment, also paid the second bond.

John Duphorn, the brother and partner of *Samuel* in the bark, was also a party to the agreement of *Samuel*, with his sureties.

After the assignment of the first bond, (on the 22nd of October, 1844,) *Baugher & Co.*, in February 1845, settled debts due to them by *Samuel* and *John Duphorn*, with the proceeds of bark delivered to them, amounting to \$753, and afterwards, in December 1846, some time after the payment of the second bond, a further settlement for bark was made between them, amounting to \$1240. From these settlements the two bonds were excluded and retained by *Isaac Baugher*, and are now the cause of action in the present suit.

To the declaration in this case the defendants have put in five pleas, which may in substance be thus abridged.

The *first two* are pleas of payment *at* maturity, and *after* the maturity of the bonds, to the assignee *Isaac Baugher*, in his life time.

The *third* is, that the defendants delivered the bark to the assignee *Isaac*, in full discharge and satisfaction of the bonds.

The *fourth*, that *Samuel*, one of the defendants, before suit, delivered bark to the value of \$1200 to *Isaac* and *Joseph Baugher*, as partners, to be applied in payment of these bonds, which was received by *Isaac* with a knowledge of this intend-

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ed application, before the assignment to him of the bonds, and that he did out of the proceeds of the bark, so pay these two bonds.

The *fifth*, that *Samuel* agreed with his sureties, that the bark taken from the land, should be applied to the payment of these bonds, and that in pursuance thereof, *Samuel* at, &c., did deliver to *Isaac* and *Joseph Baughers* bark to be so applied, the said *Isaac* knowing before the assignment, of said application, and that he did afterwards pay the said bonds out of the proceeds, &c.

On these pleas and the general replication, the issues are made up, and the instructions of the court upon the several prayers submitted at the trial, and also the verdict being in favor of the defendants, the present appeal is brought up by the plaintiffs in the case.

The hypothesis which the plaintiffs seek to maintain is, that whatever agreement, if any, subsisted between the *Baughers* and the *Duphorns*, as to the application of the proceeds of the bark, it was at all times subject to modification between themselves as debtor and creditor, and unless *Annan* and *Gamble* were parties to the agreement, they can have no right to complain of the revocation of it, or the altered direction given to the fund. It is contended that a contract made by a principal with a third party to pay off a debt, where sureties are concerned, to make it binding on such parties and irrevocable, it is necessary that the sureties should be parties to the agreement. And as a general proposition in the absence of other special circumstances, that may control or forbid the violation of such agreement, this is conceded. But a third party may have such knowledge or notice of the interest of the sureties, and may so far assent to their rights in the agreement, as to preclude him from diverting the payment and depriving the sureties of their contemplated indemnity. If he has in any way assented to the application of the fund to the particular debt, with a notice that such direction was given to it, to indemnify sureties, or if he receives the fund with that understanding, he has acquiesced in the agreement of the principal

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with his sureties, and it is not in the power of either to change it without the assent of the others. A security so given and a fund so pledged must enure by operation of law to the benefit of the sureties, and cannot afterwards be diverted to their prejudice, and the depository will be bound to apply it as directed, whether the sureties are expressly parties with him to the agreement or not.

There is therefore no error in the instruction given by the court at the instance of the defendants: "that if the jury find from the evidence in the cause that there was a contract or agreement between *Annan* and *Gamble* and *Samuel* and *John Duphorn*, to which *Joseph Baughers & Co.*, assented, that the purchase money to be paid by the *Baughers* for the bark, should be applied to the payment of the bonds, and that the bark was sold and delivered to them upon said contract, that it was not competent for the *Duphorns* and *Baughers* to apply the proceeds to any purpose inconsistent with such contract, without the consent of *Annan* and *Gamble*."

There was certainly evidence in the cause competent to go to the jury to establish such an assent between the *Duphorns* and *Baughers & Co.*, and that the money paid by *Isaac Baughers* to *Wilson*, the obligee, was paid in pursuance of it, and in liquidation of the notes. Theory to which the plaintiffs restrict this agreement and evidence is, that when the *Duphorns* should get the proceeds from *Baughers & Co.*, they were to pay the notes with the amount, and thus relieve the securities, and this it is said imposed no obligation on the *Baughers*. Concede it to be so, and yet it is not at all in conflict with the fact afterwards, that *Samuel Duphorn* as most convenient to all parties should direct *Wilson* to call and receive the money. And when *Wilson* accordingly informs *Isaac Baughers*, that the bark was delivered for the purpose, and that *Duphorn* expected the *Baughers* to lift the note, he admits the receipt of the bark, and upon an assignment of the note, he pays it. If the jury believe these facts, does it admit of a question that the defendant's pleas are maintained, and that the note is paid in conformity with the intention and agreement of the *Dup-*

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horns? If the *Baughers* had received bark enough to cover the amount of the note, and *Isaac Baugher* assented to the order to pay, it was paid by his compliance. The law will so construct it and the parties between themselves cannot afterwards revoke the payment, where the rights of third parties are concerned. At all events by such payment the sureties are discharged. And if once discharged, how can the *Baughers* afterwards revive the obligation of the sureties, by any subsequent arrangement with the *Duphorns* to give to this fund a different direction? At the maturity of the second note *Isaac* calls himself on *Wilson*, without waiting to be applied to, and becomes the owner and assignee of this second bond or note. His firm had then in hand and afterwards upon the settlement, more than enough of funds and proceeds from the bark, to liquidate both the notes. These funds were in his hands dedicated to the payment of the notes. He had knowledge and notice of the fact, and he also assented to it as *Wilson's* testimony proves. Notwithstanding the subsequent misapplication of the funds, they must be considered as in his hands, and *only* applicable to these notes in the first instance, and as soon as he became the owner of the notes by the assignment, the law regards it as a payment of them, and thus the plea of payment to *Isaac Baugher* is supported, and substantially reaches the case in the view here presented. For there is not the slightest proof offered to sustain the pretext, that he intended and did become the *bona fide* purchaser of these notes, independent of the fund in the hands of *Baugher & Co.* devoted to the discharge of them.

The court below having thus properly granted the instruction asked by the defendants, with the same propriety rejected the prayer of the plaintiffs next succeeding it, that is the third prayer in the record.

It proceeds upon the hypothesis that although a contract did exist between the *Duphorns* and *Joseph Baugher & Co.*, that the bark was to be delivered to them, and the purchase money applied to the payment of *Wilson's* notes, yet if *Annan* and *Gamble* were not parties to the contract, they, the *Duphorns*,

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and *Baughers & Co.* had a right to revoke it, *unless* the defendants should prove that *Joseph* and *Isaac Baughers* had notice of the contract existing between *Duphorn* and his sureties, that the bark should be delivered to said *Joseph* and *Isaac Baughers*, and that the purchase money was to be applied to the payment of the notes.

If the county court was right in the preceding instruction, that the assent of the *Baughers* to apply the proceeds of this bark to the payment of *Wilson's* notes, was sufficient, without being parties to the contract with the *Duphorns*, and the sureties on the notes, then it was not incumbent on the defendants to prove that they had *also notice* of the contract existing between the parties to the notes. The funds and the means placed in their hands were devoted to that particular purpose, and *Isaac* was distinctly so told and warned before he paid the notes. Sufficient then it was, that he so far recognized the arrangement and actually so applied the proceeds to that purpose. It was then not necessary that they should be notified of the contract between the others; more especially that *Isaac* and *Joseph*, *both* should have notice as the prayer requires. As partners, notice to either was notice to both. The prayer was therefore properly rejected.

The 4th prayer, (by the plaintiffs,) assumes that if before the institution of this suit, the *Duphorns* had received from *Isaac*, one of the firm, payment for the bark delivered in 1844 and '45; that the said bark was allowed in settlement between the *Duphorns* and *Isaac Baughers & Co.*, (another firm of which *Isaac* was a partner,) and applied to the payment of moneys due to that firm, with the assent of the *Duphorns*, then the plaintiffs are entitled to recover on the notes.

This is still the assertion in another form, that the *Duphorns* and the *Baughers* had a right to divert this fund, in the face of evidence from which the jury might infer that the notes were actually paid and satisfied, either to *Wilson* or to *Baughers*, the assignee, out of the fund. And if so, the *Duphorns* could have no right to demand of *Joseph Baughers & Co.*, the payment of the proceeds of the bark already applied; and the set-

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tlement afterwards made by *Isaac*, by and between the two firms of which he was a member, and the *Duphorns*, was at his own risk. There was notice to him in the first interview between him and *Wilson*, before the assignment, that the bark was so appropriated to the payment of these notes, and upon this notice, he paid them and received the assignments. After this he could have no right by another settlement with the *Duphorns*, including all the bark, to revoke the previous payment to the prejudice of the sureties, whose equities were then distinctly known to him, by their names upon the notes in his possession, and the instruction here asked was properly refused.

The 5th exception (the plaintiffs,) avers: that there was no evidence from which the jury could infer that there was an agreement between the *Duphorns* and the sureties, that the bark taken from the land purchased, was to be delivered and sold to the *Baughers*, and the proceeds applied to the payment of the bills; and that the bark was delivered to, and received by them under such agreement, of which *Isaac* had notice or knowledge when he *purchased* the notes.

Even supposing no testimony in the case which would expressly convey to *Isaac* the knowledge or notice of the agreement of *Duphorn* with his sureties, it must be admitted that he had notice of the dedication of this bark in the hands of *Baughers & Co.*, to the payment of these notes; and the first note when presented to *Isaac* by *Wilson* for payment, was notice to him of the names and position of the sureties, to whose benefit the payment was to enure, and against whom he took the assignment. There is ample testimony in the record to prove the agreement between *Duphorn* and his sureties; and upon these premises the jury had sufficient grounds to infer from the conditions connected with the delivery of the bark to the *Baughers*, and the proposed application of the proceeds, that the agreement of the parties to the notes was known to *Isaac*. And independent of this, the court could not be asked to instruct the jury that *Isaac* "*purchased*" these notes, when the question on the other hand submitted to them, was, whether he had not paid and extinguished them. This as-

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sumption of the fact of purchase must be fatal to the prayer, as calculated to mislead the jury.

We have omitted to say that *Wilson's* testimony does not stand alone, but is supported by two other witnesses in the cause. *John Duphorn*, after stating that he became a partner in the bark after the purchase, says that it was delivered by himself and his brother, with the intention of paying the notes, according to an agreement by them with *Annan* and *Gamble*, and that upon one occasion he overheard *Isaac* in a conversation with his brother, say: "That he had conversed with *Joseph Baugher* about the matter, and they had agreed to say nothing about the store accounts, and pay that note or notes." No particular note or notes were specified, nor does he know or say that the *Baughers* knew of the contract. But *Snouffer*, another witness, testifies that he delivered the bark from time to time, and expressly told *Joseph Baugher*, that "if it was not that we, (meaning the *Duphorns*,) were bound to deliver the bark for the payment of the land, we would not haul you a stick."

Surely then the court could not tell the jury, that there was no evidence from which they could infer knowledge on the part of the *Baughers*. On the contrary, in connection with this testimony, they were bound to submit the whole to the jury, and properly rejected the prayer of the plaintiffs.

This testimony, however, has been excepted to by the plaintiff, but we think upon insufficient grounds. *John Duphorn*, it is said, is a partner in the bark, and a partner in the land, as is shown by the recital in the deed of trust subsequently executed by the *Duphorns* of the one part, and *Annan* and *Gamble* of the other, in 1848, and long after the assignment to *Isaac Baugher*, to secure the payment of these notes, which deed the plaintiffs produce in evidence. The deed recites that he became so interested after the purchase by *Samuel*; and it is objected to him that he is now interested in defeating these plaintiffs, thereby relieving this security of the land, which consequently enures to the benefit of the witness. But if he does defeat the plaintiffs in this action upon the notes, he

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is still to refund to them as a partner with *Samuel* in the bark, which has then been overpaid by the *Baughers* to the amount of these notes. In either event his liability accrues, and his interest is balanced. For if the plaintiffs recover, he is equally liable over to *Samuel* for contribution as a partner, both in the bark and in the land.

But even if not so, the objection comes too late. In the progress of the trial after the testimony of *Wilson* had been read to the jury, this deposition of *John Duphorn* was introduced by the defendants, and *Snouffer* was then examined by them. The plaintiffs to rebut this testimony, examined *Eli Smith*, and afterwards introduced the deed from the *Duphorns* to *Annan* and *Gamble*. After all this evidence on both sides was in and made part of the first three bills of exception, and after all the other exceptions, the plaintiffs for the first time suggest this exception to the testimony. The objection is certainly not in due time, and should properly be made, when the interest of the witness is first disclosed to the party. *Starkie's Ev.*, 757.

The deposition which was filed in court, avows that *John* was half interested in the bark with his brother. At the trial, the plaintiffs had also in their hands the deed of trust confirming the fact of his interest in both the bark and the land. Yet they permitted the deposition to be read, and introduced the testimony of *Smith*, to contradict and explain it, and only after all the testimony and other exceptions were before the jury, take this objection. Under such circumstances it comes too late. It must at least be taken in a reasonable time after the objection is known to the party. 5 *Grill*, 120.

We are at a loss to perceive how the testimony of *Snouffer* "is irrelevant to the issue, as not showing any connection of *Isaac Baugher* with it." In the first place it shows the delivery of the bark to *Joseph Baugher & Co.*, and next, that *Isaac* was a partner of that firm with *Joseph*, to whom the conversation of the witness was directed. It thus establishes one of the elements of proof from which the jury might infer notice to *Isaac* some months previous to the payment and as-

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signment, that the bark was delivered with a view to that payment. It is therefore both material and relevant to the issue; and in this as in all the other instructions of the county court, there is no error. The judgment below must be affirmed.

JUDGMENT AFFIRMED.

BENNET CLEMENT'S, LESSEE, vs. HENRY RUCKLE.—December 1850.

An escheat grant is *prima facie* evidence of title.

A witness stated that a letter written to himself, the contents of which he offered to prove, was "either lost or delivered to one of the counsel in the cause and that he had made diligent search for it but could not find it,"

HELD: that this was not sufficient proof of the loss of the letter, to let in parol proof of its contents.

Where a defendant claims but part of the lands in controversy, his proper defence is upon warrant; the lands claimed by him must be located, so as to ascertain for what land, the plaintiff is to get judgment against the casual ejector, and what is to be settled by the jury.

A judgment against the casual ejector must always be entered before the jury are sworn unless the defendant takes defence for all the lands claimed by the plaintiff.

APPEAL from *Allegany* county court.

This was an action of *ejectment* brought by the appellant for a tract of land called "*Lorrain*," containing 600 acres. The defendant the appellee, under the plea of not guilty, took defence upon his title for eight lots, the numbers of which are stated, "lying west of *Fort Cumberland* the same being part of said tract of land called *Lorrain*."

1ST. EXCEPTION. The plaintiff offered as his title a patent (an escheat grant) dated the 16th of August 1843, to himself, for twelve lots of land numbered, &c., reduced to one entire tract called "*Lorrain*." He also offered a certificate of the register of the land office, showing that four of the lots em-

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braced in the patent, numbered, &c., were allotted to *Henry Clements* under the act of November session 1788. The defendant then offered to prove by *William Ridgely*, that witness received a letter purporting to be from *Bennet Clements* of *Georgetown*, asking witness to sell a tract of land for him called *Lorrain*; that witness finding, upon examination, that *Ruckle* the defendant had possession of part of the lots, wrote a letter directed to *Bennet Clements*, stating this fact, and received a letter in reply directing witness to see *Ruckle* and compromise with him and sell the lots to him at a fair price; that *Ruckle* refused to purchase, and witness then wrote another letter directed to *Bennet Clements*, asking if he could not make a title independent of the escheat from the heirs of the old soldier, and received an answer stating as near as witness recollects that the heirs of *Henry Clements* the officer or soldier could not make a title to the land; there was a reason given why, which witness does not recollect; "that this last mentioned letter is either lost or delivered to one of the counsel in the case, and that witness made diligent search for the same but could not find it:" witness received near a half dozen letters about this land signed *Bennet Clements*, and thinks he would know the handwriting of the person who wrote them if he were to see it; that witness never saw *Bennet Clements*, nor did he ever see him write, the letter; did not state that there were no heirs, nor that they were dead; that all said letters except the one above mentioned as lost or handed to one of the counsel, are now in witness' possession. The defendant then appeared to prove by *Geo. W. Taylor* that *Bennet Clements*, the plaintiff, lives in *Georgetown, D. C.* To all this testimony, the plaintiff, objected because *Ridgely* does not know the handwriting of *Bennet Clements*, the plaintiff, and there was no foundation laid for its introduction or proof by witness, of the handwriting of the plaintiff, or the contents of said letter, and because it is insufficient and incompetent for the purposes for which it is offered. The court (MARTIN, C. J., and WEISEL, A. J.,) overruled the objection and plaintiff excepted.

2ND. EXCEPTION. The plaintiff then prayed the court to

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instruct the jury: 1st. That he is entitled to recover because defendant's evidence is indefinite and insufficient and ought not to be permitted to go to the jury, to prove that *Henry Clements* the original grantee from the State of the four lots in controversy had heirs now living, or that he died leaving heirs at the date of the escheat warrant to the plaintiff. 2nd. That he is entitled to recover, unless defendant can show title in a stranger, and there is no evidence by which the jury can determine such to be the case. The court refused to grant these prayers, and the plaintiff excepted.

The verdict being for defendant, the plaintiff moved for a new trial, on the ground that the verdict was against the evidence, that the court misdirected the jury, and that new evidence had been discovered. This motion the court overruled and gave judgment for defendant, from which the plaintiff appealed.

The cause was argued before SPENCE, MAGRUDER and FRICK, J.

By BEVANS, PERRY and LEE, for appellant, and
By MCKAIG for the appellee.

MAGRUDER, J., delivered the opinion of this court.

The plaintiff brought an action of ejectment in *Allegany* county court, for a tract of land called *Lorrain*, and the verdict being against him, he appealed. In the course of the trial he took two bills of exceptions, and whether the court erred in the opinion expressed by it, according to either of those exceptions, we are now to decide.

The plaintiff, to make title to the land claimed by him in his declaration, offered in evidence a patent for that tract of land, granted to himself, and bearing date 16th day of August, 1843. Why he offered in evidence the certificates of the register of the land office, we do not understand. These papers, however, though unnecessary, could not prejudice his title. His patent is an *escheat* grant, which is *prima facie* evidence of title. *Hall vs. Gittings*, 2 H. & J., 112. The defendant thereupon, to show title, it would seem, out of the plaintiff, offered

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to examine a witness, and by him prove the contents of letters written to, and received from, *Bennet Clements*. But the witness never saw his correspondent, and, of course, had never seen him write, nor could he tell whether the plaintiff in this action was his correspondent.

What was the correspondence to prove? A title to the land in controversy, to be out of the plaintiff. How? Witness inquired of his correspondent if he could not make a title independent of the escheat grant, deriving it from the heirs of *Henry Clements*. In the answer, he is informed, that the heirs of *Henry Clements* could not make a title to the land. The writer gave a reason, but the witness does not recollect what it was. It might have been, that those who were his heirs elsewhere were aliens in *Maryland*, and could not inherit the land; or it might have been that the land had been conveyed in fee, to some other person, upon whose death the land had escheated. Even if the correspondent of the witness had been admitted to be the plaintiff, it is difficult to deduce from the correspondence the fact that it was offered to establish, to wit; that the title was in the heirs of *Henry Clements*. If it had been, it is difficult to prove why they could not make a title, unless they were minors, lunatics, &c.; and this it cannot be presumed was the reason assigned.

In addition to this, the proof of the loss of the paper was not sufficient to authorize the court to let in parol proof of its contents.

There is one other objection to all this proof offered by the defendant. The plaintiff claims a tract of land, the patent name of which is *Lorrain*, and claims it by that name. The defendant, it would seem, claims no land *eo nomine*, or by any other name which *Lorrain* may have acquired by reputation. His defence is, that the patent for *Lorrain* could give the plaintiff no title, forasmuch as the State had previously to the grant, parted with the title to the land, or part of the land included in the grant. It is to be inferred from all that we read in the record, that the tract of land, claimed by, and patented to the plaintiff, consisted wholly, or in part, of what are called

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soldiers' lots; that some of these soldiers' lots were originally owned by *Henry Clements*, spoken of by the witness; but we do not collect, from any part of this record, that the lots of *Henry Clements*, if located, would comprehend all the land which was granted to the plaintiff, as before stated. Indeed, when the defendant took his defence, (not upon warrant, but upon title,) he states, that he takes it for certain lots, (giving the numbers of them,) "the same being *part* of a tract of land called *Lorrain*;" but what part of it, whether the east, south, north or west, it is not stated, though it is said the lots "lie west of *Fort Cumberland*." Certainly if any such defence be made, the proper defence is upon warrant. The plaintiff's land must be located, the lots for which defence is taken, must also be located, in order to ascertain for what land the plaintiff is to get judgment against the casual ejector, (a judgment which must always be entered before the jury are sworn, unless the defendant takes defence for all the land claimed,) and how much of the plaintiff's claim and pretensions is in controversy, and to be settled by the jury. For the want of these locations the matters in issue are as unintelligible as they would be, if when the defendant takes defence upon warrant, the locations of the parties were made and returned upon separate sheets of paper.

The testimony of *Mr. Ridgely* was inadmissible.

It may be added, that the testimony of *Taylor* could not benefit the defendant.

Of course, the court erred in refusing to grant the first instruction stated in the second bill of exceptions. With respect to the last prayer mentioned in the second exception, to have been made by the defendant, the objection to it is, that the court is asked to say, that the plaintiff is entitled to recover, unless the defendant proves title in a stranger. To be sure defendant did not even attempt to prove title in himself, but there was no more proof of title in a stranger than in himself. The plaintiff's patent (there being no legal proof that any part of the land granted to him had not escheated) entitled him to a verdict.

JUGDMENT REVERSED WITH COSTS, AND
PROCEDENDO AWARDED.

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JAMES B. BELT, ADM'R OF WALTER S. CLARKE, vs. JONATHAN MARRIOTT, ADM'R OF WM. MARRIOTT, of THOS.—
December 1850.

The legal sufficiency of evidence in a question of law of which the court are the exclusive judges.

Wherever testimony is so light and inconclusive that no rational well constructed mind can infer from it the fact which it is offered to establish, it is the duty of the court when applied to for that purpose, to instruct the jury that there is no evidence before them to warrant their finding the fact thus attempted to be proved.

Proof was offered that a certain *R. P.*, claiming to act as trustee, employed witness to sell all the estate of *Walter Clarke*, and that at the sale he sold the negro woman *Jemima*, to *Caleb*, the brother of said *Walter*, and that *Walter* there delivered the woman to *Caleb*. The witness does not know what was bid for the woman, or whether the money so bid was ever paid; that the woman was never out of possession of *Walter*, except as stated, but continued in his possession to his death, and afterwards with his widow. **HELD:**

That this testimony was not sufficient to justify the inference that there was a sale of the negro woman in question from *Walter* to *Caleb Clarke*, and that it was error to permit it to go to the jury for that purpose.

This evidence might have led to the conclusion that *Walter*, standing by and remaining silent while the auctioneer, by direction of *R. P.*, was selling the negro, thus forfeited his title to his brother, provided the latter had, at the time, taken possession, or had ever afterwards claimed the property.

The question of sale or no sale is a question of law, and is not to be decided by the opinions of witnesses: it is also a question of law what shall be deemed a delivery upon the sale of goods.

Every contract obligatory, ought to have a *quid pro quo*, and payment ought to be made on the delivery of the goods, except when a future day is agreed on.

There must be a delivery of the goods with intent to vest the right of possession in the vendee, and there *must be an actual acceptance by the latter*, with intent to take possession as owner.

An instruction which permits the jury to construe the provisions of an act of Assembly, is erroneous: it is the province of the court to do this.

Where the title to a negro accrues by forfeiture under the act of 1817, ch. 112, notice or knowledge to the reversioner is not necessary in order to bar his claim by the right of possession.

In an action of *trover*, limitations begin to run from the conversion, unless the plaintiff be prevented by the fraud of the defendant from obtaining

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knowledge of it; if there is no fraud, the fact that the plaintiff was ignorant of the conversion, will not prevent the running of the statute.

Where the owner of a slave for life transfers to a vendee an interest for a term of years in the negro, such a disposition of a slave for life, is not within the provisions or the spirit of the act of 1817, ch. 112.

APPEAL from *Anne Arundel* county court.

This was an action of replevin brought by the appellant, as administrator of *Walter Clarke*, for a negro boy named *Henderson*. The pleas were *non cepit*, property in the defendant, and property in a stranger. The facts of the case and the exceptions, are all fully stated in the opinion. The verdict and judgment was for the defendant, and the plaintiff appealed.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

By PRATT, for the appellant, and
WM. H. G. DORSEY and A. RANDALL, for the appellee.

FRICK, J., delivered the opinion of this court.

On the 12th of January, 1820, *William Marriott*, the appellee's intestate, being the owner of a negro woman named *Jemima*, by bill of sale duly executed and recorded, transferred and delivered the said negro woman to *Walter S. Clarke*, to serve for the term of ten years from the date, and the children of said *Jemima*, if boys, born during the said term, to serve until the age of thirty years. The boy in question in this suit, was born in 1833, and during the said period of the mother's servitude.

Walter Clarke died in the year 1826.

The appellees offered in proof in the court below, that about eighteen months before his death, a certain *Richard Peach*, claiming to act as trustee. employed as auctioneer, the witness, to sell all the estate of *Walter Clarke*; and that he sold at said sale the said negro woman *Jemima*, to *Caleb*, the brother of said *Walter*, and that *Walter* there delivered the woman to

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Caleb. The witness does not know what was bid for the woman, or whether the money so bid was ever paid; and further states that the woman was never out of the possession of *Walter Clarke*, except as stated, but she continued in his possession up to the period of his death; and afterwards with his widow, until after the birth of the boy, who, at the age of two or three years, was, from the proof, still in the possession of the widow.

On this state of facts, the defendant prayed the court to instruct the jury: 1st. "That if they find from the evidence that negro *Jemima* was sold by the said *Walter S. Clarke* to the said *Caleb Clarke*, as the defendant has endeavored to prove, then the right of said *Caleb Clarke*, as purchaser could not be avoided in this action by proof, if believed by the jury, that the said sale was intended to defraud the creditors of the said *Walter S. Clarke*. 2nd. That as the said *Walter S. Clarke* claimed title to the said negro *Jemima*, under the bill of sale from *William Marriott* to the said *Walter*, that if the jury shall find that the said negro was sold and delivered by the said *Walter S. Clarke* to the said *Caleb*, as aforesaid, and that no bill of sale was given to the purchaser as required by the 3rd section of the act of 1817, ch. 112, then that the interest and estate of the said *Walter* in said negro, was thereby divested; and the right and title to said negro reverted to the said *Marriott*, unless the jury should find that the omission to give such bill of sale, was not fraudulently designed, otherwise than as against the creditors of said *Walter S. Clarke*;" which instructions the court gave, and the counsel for the plaintiff excepted.

This negro being the property of *Walter S. Clarke* in 1820, remaining in his possession until his death, and there being no ground for a presumption that *Marriott* the vendor, or any person deriving title from him, ever had possession, or set up any title to *Jemima* or her child, until the institution of this suit, it would seem that the plaintiff is entitled to the negro boy now in controversy, unless it can be shown that his intestate by his own act, lost or parted with the title thereto.

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This fact, the prayers assume the jury were at liberty to find from the alleged sale to *Caleb*, predicated upon the evidence before referred to and submitted to the jury for that purpose. The question then is, had all or any of this testimony a tendency to satisfy the minds of the jury, that on the occasion spoken of by the witness, a sale of this negro was made to *Caleb Clarke*, which would have been valid, but for the provisions of the act of 1817, ch. 112.

It is the undoubted right of the jury to find all matters of fact, where evidence legally *sufficient* for the purpose is submitted to their consideration. *Davis vs. Davis and others*, 7 *H. & J.*, 136. And this legal sufficiency is a question of law of which the court are the exclusive judges. Wherever the testimony adduced by the plaintiff (and the same is true of testimony by the defendant,) "is so light and inconclusive, that no rational, well constructed mind can infer from it the fact which it is offered to establish, it is the duty of the court when applied to for that purpose, to instruct the jury that there is no evidence before them to warrant their finding the fact thus attempted to be proved." And in the case of *Cole vs. Hebb*, 7 *G. & J.*, 20, we are told, "evidence offered to a jury, has a two-fold sufficiency, a sufficiency in law and a sufficiency in fact. Of its sufficiency in law, the court when applied to for that purpose, are the exclusive judges." So in 3 *H. & J.*, 109, the then chief justice (CHASE) says, "it appertains to the court to determine upon the legal sufficiency of evidence to prove a fact."

The question here would seem to be, not whether upon the occasion to which the witness refers, and after he had twice been sent for, *Walter Clarke* was anxious to sell to his brother the negro, but whether the brother was anxious or willing to become the owner *by the purchase* of him. The alleged *status* of the negro, (always in possession of the alleged vendor, and never claimed by his brother) might be used as well to establish a gift as a sale, and if so, by the act of 1763, did not pass any title to the donee. The defendant must then in order to prove a sale to *Caleb*, rely upon this so termed delivery

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as the consummation of the alleged contract. The witness who proves it, was the auctioneer, and from his own testimony the jury could not infer that he was the agent of *Walter Clarke* in the premises. Neither could they learn from his testimony what was the contract on the part of *Caleb Clarke*, and when he was to become the owner and upon what terms. The witness was sent for in the name of *Peach*, claiming authority to sell all the property of *Walter* "as trustee," although for what purpose, and when and how appointed, is not stated.

A contract we are told is a "*mutual* assent of two or more persons competent to contract, founded on a sufficient and legal motive, inducement or consideration to perform some legal act, or omit to do anything, the performance of which is not enjoined by law." *Chitty on Contracts*, p. 8. 1 *Com. Dig.* (B. 2,) 541 Every contract obligatory ought to have a *quid pro quo*, and payment ought to be made on the delivery of the goods, except when a future day is agreed on. See *Com. Dig.*, title *Agreement*.

"In order to satisfy the statute, there must be a delivery of the goods with intent to vest the right of possession in the vendee, and there *must be an actual acceptance by the latter*, with intent to take possession as owner." 2 *Starkie on Evidence*, 490.

If when *Walter Clarke* is supposed to have delivered, *Caleb* had taken the possession of the negro, then a sale might be presumed. But *Walter*, it is distinctly shown, retained the possession until his death, and the alleged vendee never claimed or admitted himself to be the purchaser and the owner. The alleged sale was made, not by the owner of the property, but by an auctioneer, who is unable to give any account of the terms of sale, whether for cash or credit, or what was the highest bid, (there being in fact no other person present besides *Caleb*, who was competent to bid.) In other words, this witness gives us not the slightest clue to the contract, which was thus to be consummated by this alleged delivery of the property.

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For what purpose this proof was offered is not distinctly stated. It is presumed, that it was not designed thereby to prove that the title of the negro was in *Peach*. And if it was not, then a sale by *Peach* could not prejudice any title which *Walter Clarke* had in the negro.

It could not prove a sale by *Walter Clarke*, to his brother *Caleb*, although what the witness states, if believed by the jury, might have led them to the conclusion, that *Walter Clarke* standing by and remaining silent, while the auctioneer by direction of *Peach* was selling the negro, thus forfeited his title to his brother; provided *Caleb* had at the time taken possession, or had ever afterwards claimed the property. See *5 Johns, Ch. Rep.*, 188.

The question of sale or no sale, is a question of law, and is not here to be decided by the assertion or construction of the auctioneer, who is to state facts which will enable the jury, under the direction of the court, to determine whether there was such a sale as is in view of the provisions of this act of 1817, or the acts of 1729, ch. 8, or 1763, ch. 13.

And so also it is a question of law, and very often a question extremely difficult to decide, what shall be deemed a delivery upon the sale of goods. *11 Johns. Rep.*, 283. *1 East*, 292. *1 Taunt*, 457. Upon either of these points, the opinion of the witness, however honestly entertained, or with whatever confidence expressed, ought to have been excluded from the consideration both of the court and jury.

We are therefore of opinion, that there was error in permitting the jury under the first instruction, to find from the evidence that there was a sale from *Walter* to *Caleb Clarke*. And even if the court had been properly applied to, to give the jury the law, which it was necessary they should have, in order to decide the case, the testimony, as we have said, was not sufficient to justify the inference of a sale, which they were to find from it. Nor was there anything in the case to authorize the latter branch of this instruction. There was not a particle of evidence to show that *Walter S. Clarke* had any creditors; nor were the rights of creditors in question in the

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case; and the addition was therefore calculated to mislead, instead of assisting the jury in forming their verdict.

The second instruction is, of course, liable to the same objection, that it refers to the jury to find that there was a sale from *Walter* to *Caleb Clarke*. And besides, it submits to the jury to find, when there was no evidence to authorize it, whether there was such a bill of sale as is required by the act of 1817, chap. 112. At the same time, it constitutes the jury the judges of the law of that act, the provisions of which, it was for the court to expound and interpret, and not to allow the jury to find and construe them; in all which, there was error in the county court.

In the further progress of the cause, the court afterwards instructed the jury, "that if they shall find that the interest of the said *Walter S. Clarke* in the said negro *Jemima*, was vested in the said *William Marriott*, by reason of any failure on the part of the said *Walter* and *Caleb* to comply with the requisitions of the act of 1817, such title would be barred by an adverse holding by the said *Walter*, for more than three years after the title had accrued, and after the said *Marriott* had notice of such sale and delivery, as aforesaid, and of the claim of said *Walter* to hold adversely, as aforesaid." And further, "that to create such a bar by limitations, it was incumbent on the plaintiff to show an adverse possession, as aforesaid, for upwards of three years, by the said *Walter* in his lifetime. That if he held the said negro adversely, up to the time of his death, but for a space less than three years, and if immediately after his death, his widow acquired the possession, and held said negro adversely, as aforesaid, for more than three years, then, that the possession of said *Walter*, combined with the possession of his widow, would not, in favor of the plaintiff, create in him such a title as would, in virtue thereof, entitle him to recover."

We are of opinion, that in this, also, the county court erred. It is true, that there are classes of cases, in which it has been decided that the owner must have notice, that the holding by another of property, to which the former has title, is adverse.

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See the cases of *Callis vs. Tolson*, 6 G. & J., 80, and *Hume vs. Pumphrey*, 4 Gill, 181. This, however, is not regarded as such a case, and very great mischief would arise from so considering it. The reversioner is not necessarily entitled to the negro, if there be no bill of sale, or if it be not such a bill of sale as the act of 1817 requires. The seller may not have intended a fraud in the omission of any thing required by the act; and if so, there is no forfeiture of his title. In all such cases, however, the *onus* is upon the seller. It may be, that the reversioner is aware that no fraud was designed; and for that reason, simply, does not assert a title to the negro, until the evidence that no fraud was intended, is lost.

It may be asked, how is the reversioner to know of the sale? Perhaps not very readily in such a case as is now before us, where, if there was any sale, there was no change of possession. The act of Assembly, however, seems to contemplate cases, wherein the party who sells parts with the possession; and requires "the residence of the purchaser" to be inserted in the bill of sale, to the end that the reversioner may know where his property is when the term expires at which he may resume his title.

Where the title, as is here asserted, accrues by forfeiture, we cannot think that notice or knowledge to the reversioner is necessary, in order to bar his claim by the right of possession. This is the law in analogous cases. In an action of trover, a lapse of six years from *the conversion*, is, in *England*, a defence to the action. 2 *Philip's Ev.*, 136. And it is also there said, and also, at page 136, note 5, and the authorities there cited, "that it might have been different if the plaintiff had been prevented by the fraud of the defendant, from obtaining knowledge of what had been done. If no fraud, the case will not be altered by the circumstance, that the plaintiff did not know of the conversion within the period of six years from the commencement of the suit." See also, 2 *Greenl. on Evid.*, secs. 430 and 443.

If the defendant, or rather his intestate, acquired title to the negro in the manner stated, he might have asserted that title at

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any time after its accrual, and, notwithstanding the death of *Walter S. Clarke*, without letters of administration having been granted upon his estate. He might have claimed the negro of any person who had the possession. The possession of the widow of *Walter*, if the negro was the property of her husband, was precisely such a possession as we find in the case of *Sewall vs. Fishwick*, 4 H. & G., 393; and vested in her no title. In the language of the court in that case, it was "a fiduciary possession" to preserve the property for the benefit of the creditors and representatives. It was because of this that the administrator of *Fishwick* recovered in that suit; although, if a person claiming the negroes there in controversy, (whether he made title under *Miss Fishwick*, or in opposition to her claim,) had forbore to bring suit until administration was had upon her estate, length of time would have been a bar to his action. As before said, the instruction of the court upon this point was erroneous. The jury must have understood the court to instruct them, that in order to bar his claim, acquired as there mentioned, *Marriott* must have had three years previous notice of the sale and delivery by *Walter* to *Caleb Clarke*. Besides this, the instruction assumes the sale and delivery.

After the evidence in the preceding instructions, and while the law as laid down by these instructions, interposed, and as the case was under argument before the jury, the court conceiving that the counsel for the plaintiff denied or misconceived explanatory instruction, stated to the jury, "that if they found the truth of the facts, as given in evidence by the witness, on the part of the defendant, and that there was, as stated by him, a sale and delivery of said negro woman, by *Walter* to his brother *Caleb Clarke*, and that such sale was made for the purpose of defrauding the creditors of the said *Walter*, that the interest and property of said *Walter* in the negro *Jemima*, thereby passed out of him, and that the right of the plaintiff to maintain the present action, was as effectually barred thereby as if the said sale and delivery had been *bona fide*, and for valuable consideration."

Here again, as in the first instruction, we find the creditors

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of *Walter S. Clarke* introduced, with another feature, which we deem still more objectionable. After saying, "if the jury believe the truth of the *facts*, as given in evidence by the witness on the part of the defendant," the instruction adds; "and that there was, *as by him stated*, a sale and delivery of the negro woman, by *Walter* to *Caleb Clarke*." This, we conceive, must have been understood by the jury to mean, that they must believe there was such a sale and delivery as the defendant contended for, unless they disbelieved the witness; and as susceptible of such a construction is manifestly wrong. At the same time, it submits to the jury to find from his evidence, that there was a sale from *Walter* to *Caleb*, which, for the reason assigned, we have heretofore condemned in the first instruction, and must, therefore, reject as error in this.

One further suggestion of counsel for the appellee, in the argument of the cause, demands a brief notice.

It was intimated, that the original bill of sale from *Marriott* to *Walter S. Clarke*, was not such a bill of sale as is required by the act of 1817, chap. 112, sec. 3. But it is not pretended that the negro *Jemima* was a slave only for a term of years. In fact, the bill of sale indicates distinctly, that she was the slave for life of *Marriott*, who, by that instrument, undertook to transfer to the vendee an interest for a term of years, in the negro that thus belonged to him for life, and to the possession of which negro he was to be restored at the expiration of the term of years. Certainly then, the vendor who gave the bill of sale, cannot be permitted to claim that the negro was again and immediately his property, acquired by his own act of non-compliance with the act of Assembly. The proposition need only be stated, to show its own fallacy; and that such a disposition of a slave for life, is not within the provisions or the spirit of the act of 1817, chap. 112.

JUDGMENT REVERSED, AND

PROCEDENDO AWARDED.

Higgins, *et al.*, vs. Horwitz.—1850.

**WILLIAM HIGGINS, WILLIAM TRAVERS AND ANN TRAVERS
HIS WIFE, AND OTHERS, vs. ORVILLE HORWITZ.—December 1850.**

By the act of 1836, ch. 128, sec. 2, a complainant has authority under the commission in chief, to take all the testimony necessary to sustain his case, as well against defaulting as other defendants. and such commission dispenses with the execution of an *ex parte* commission issued under the act of 1820, ch. 161.

An interlocutory decree was passed against two defaulting defendants, and an *ex parte* commission ordered. On the same day the guardian of an infant defendant appeared, and a commission was then issued to commissioners, "as named on the part of complainant and defendants," requiring notice to be given "to the respective parties." **Held:** That this was a commission in chief.

Where an infant answers by guardian, admitting the facts stated in the bill or making no defence, the act of 1836, ch. 128, sec. 1, connects and binds the interest and defence of such infant with that of the other defendants, and the evidence taken for the complainant under a commission issued in due form, necessarily operates against all the defendants.

This act of 1836 assumes for the court the duty to see, that no substantial rights of the infant are injuriously affected by the proceedings under the commission, and in the cause.

Whether notice of the execution of a commission be served on the guardian to the infant or his solicitor, it is in view of the act of 1836, surplusage, and can vitiate nothing that is presumed to have been done under it.

The practice that occasionally occurs, of making the complainant the trustee for the sale of the property under the decree, is objectionable.

APPEAL, from the equity side of *Baltimore* county court.

This appeal was taken from a decree for the sale of certain leasehold property mortgaged by the appellant, *William H. Travers*, to the appellee. The facts of the case and the objections to the decree are fully stated in the opinion of this court.

The cause was argued before **SPENCE, MAGRUDER, MARTIN and FRICK, J.**

By **BRENT**, for the appellants, and
By **WM. SOHLEY**, for the appellee.

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FRICK, J., delivered the opinion of this court.

The bill in this case was filed by the appellee to foreclose two mortgages executed by *William H. Travers*, of certain leasehold estate, acquired in right of marriage with *Ann C. Martin*, his wife. The bill was originally filed against *Travers* alone.

Subsequently the bill was amended to show that after the execution of these mortgages, *Travers* had conveyed all his equity of redemption to *William Higgins*, in trust for *Ann C. Travers*, his wife, for life, and after her death for *Emma A. Travers* an infant; and that afterwards *Travers* having become insolvent, *R. Ridgely Battee*, was appointed his trustee under the insolvent laws.

A commission was regularly issued to appoint a guardian for the infant defendant, and her answer filed, together with the answer of all the other defendants, except *Higgins* and *Ann Travers*. Against these two, an interlocutory decree was signed under the act of 1830, ch. 161, and an order given to issue the usual commission *ex parte*.

Afterwards a commission appears to have issued to *John Carrere* and *Joseph B. Williams*, "named by the complainant and defendants," to take testimony in the cause, and the solicitors of the defendants who had appeared, and of the guardian *ad litem*, were regularly notified to attend the commission, which was thereupon duly executed, and returned upon the 24th of May 1849. The cause was then, on the 13th of June following, submitted by written agreement of the complainant, and the solicitors for all of the defendants who had answered, and a decree of foreclosure and sale, appointing the complainant to make such sale, was passed on the 15th of June 1849.

From this decree an appeal has been brought to this court, upon various alleged irregularities in the proceeding, which it is contended present a case for reversal of that decree.

The principal objection upon which most of the errors suggested arise, is upon the appellants' 1st Point. "That the commission to take testimony issued to *Carrere* and *Williams* ir-

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regularly and contrary to law, so far as all the defendants were concerned except *Higgins* and *Ann Travers*."

This objection means that the commission must be regarded as *ex parte*, and consequently binds none other than the parties to the interlocutory decree, because the order directing the commission proceeds from the complainant, who himself names the commissioners. That consequently, no opportunity was offered to the defendants to select or strike commissioners, and as to them, the commission of whatever character was improvidently issued.

The inspection of the commission found in the record, does not support this view. It is true it is directed to *Carrere* and *Williams*, the parties before named by the complainant, and when perhaps he intended a commission *ex parte*. But afterwards, and on the same day, the guardian of the infant appeared in court by solicitor, and we then find the style of this commission runs to these commissioners as "named on the part of the complainant and defendants." It is not therefore such a commission under the act of 1820, ch. 161, as is exclusively for the benefit of the complainant, and where the testimony is confined to proof of the allegations of the bill against the defaulting defendants, and as intended to operate against these exclusively, no notice to the other defendants is necessary. In the commission before us notice is required to be given "to the respective parties;" of course to the defendants who have answered. And the commissioners further certify that such notice was given to the solicitors of the defendants, and of the guardian *ad litem* of the infant defendant. Looking to the whole tenor of the commission and its terms, it would indicate that the commissioners were properly struck, or what is equivalent and equally binding, that they were selected by consent between the complainant and defendants themselves, and so selected, the testimony taken under it, must affect all parties notified of the action of the complainant upon it.

That there was an outstanding order for a commission *ex parte*, cannot affect the case, whether such commission was or was not issued. If there be a commission in chief, as

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we construe this to be, the execution of the other is dispensed with by the act of 1836, ch. 128, sec. 2, by which the complainant has authority under the commission in chief, to take all the testimony that may be necessary to sustain his case, as well against defaulting as against other defendants, who are parties to the commission.

But it was said, 2nd. "That the notice of the execution of this commission served upon the solicitor of the guardian, and not upon the guardian himself, cannot bind or give effect to this testimony against the infant."

This objection, we think, is answered by this same act of 1836, ch. 138, in the first section, which would seem to point expressly to the embarrassment and difficulty which would often result from the peculiar privileges attached to infants, and the wholesome protection with which the law surrounds their rights. It provides that when the answer of the infant is in, admitting the facts stated in the bill, or making no defence to the claim of the complainant, a commission to take testimony may then *issue in the usual form, &c.* This assumes for the court the duty, at all times expected from them, to see that no substantial rights of the infant shall be injuriously affected by the proceedings under the commission and in the cause. And whether the notice of the commissioner was to the guardian or his solicitor, it is in view of this act of Assembly, surplusage; and can vitiate nothing that is presumed to have been done under it.

The validity of the commission, and the proceedings so far being sustained, it is presumed that the appellant's counsel in this position of it, does not intend to reply upon his *third objection*: "That the cause was submitted for hearing prematurely, and there was no sufficient consent to justify the submission." The cause, by the written agreement of complainant, and the solicitor for those defendants who had answered, was submitted for a decree. The submission is within the express provision of the act of 1846, chap. 60, sec. 2, and is in all respects free from objection.

On the *4th Point* we think there was no necessity for

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the proof of the insolvent proceedings against *Travers* and the appointment of *Battee* as his trustee. The allegation in the amended bill, and his own admission by his answer, are enough for the purposes of this case. He was properly introduced into the cause, to assert the rights of the creditors of *Travers*, and to controvert the allegations of the bill, if susceptible of denial. But he admits the facts, or has not the means to controvert them. And what are they so far as he is concerned? That the insolvent was entirely divested of all interest in the property before his application, and that consequently, not a shadow of right passed to his trustee or his creditors, unless the conveyance was a fraud upon the insolvent laws. The trustee, however, does not impeach it; none of the other defendants controvert it. They in fact received the benefit of it. *Prima facie* then, the deed is good, unless some provision of the insolvent laws forbid it; and *Travers* having parted with all title and equity, left nothing to vest in his trustee. *Battee*, therefore, whether *proved* to be the trustee or not, if the creditors can assert no claim to the property, cannot affect the right of the complainant to have it sold by the regular and usual proceedings in a court of equity. And this state of the property, and the parties, disposes of the fifth point, which claims for the trustee of the insolvent, the right to sell and distribute the property, in which neither he nor the creditors he represents, have a shade of interest either vested or contingent.

6TH POINT. The regularity of the commission being established, this objection to the proof of the conveyances in the record, falls with the objection to the commission. They are regularly proved as originals, by the subscribing witnesses, or as authenticated copies from the records. The effect of this evidence being no longer *ex parte*, (as was contended,) extends to all the defendants defaulting or answering; and the 1st sec. of the act of 1836, by the proper course of proceeding in this cause, connects and binds the defence and the interest of the infant defendant, with that of the other defendants in the cause; so that evidence necessarily operates against all.

7TH POINT. The appellants have suggested yet another

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error in the proceedings, which is, that the complainant himself was erroneously appointed the trustee. There is more reason and force in this objection than validity in law; and it is, at least, entitled to a passing notice from the court.

There is an obvious objection to the practice that occasionally occurs, of constituting the complainant himself, the party to make the sale of mortgaged property, when the trustee ought to be a person entirely disinterested between the parties, and free from all temptation to abuse his trust. His relation ought to be, as far as possible, impartial between the parties, and free from the seductions of personal interest, to conduct the sale to his own advantage. Cases might be readily suggested where an unscrupulous trustee, regarding his own rights alone, and looking to his own interest, might press the sale to the prejudice of other postponed claimants upon the property, whose rights it should be his particular duty and trust to protect. Convenient opportunity is presented for collusion, if an unprincipled complainant should be disposed to practise it. His own claim in priority, gives him facilities to make himself the owner of the property, by sacrificing the interest of other creditors and claimants. He has advantages and temptations which he ought not to have; and the character of claimant and trustee, for these reasons, should never be united. They are incompatible, and to insure equity and justice, should be always antagonist. Likened to the case of sheriffs and many other officers of court, complainants, as trustees, should not be clothed with the execution of proceedings in which they are parties in interest. In these analogous cases, the law wisely forbids it. And the reason and policy are the same in the case of trustees in chancery; but the practice has been otherwise; and although this court may think it reprehensible, and may not sanction it by their opinion, yet in the proceedings now before us, we are not at liberty to pronounce it error. The decree of *Baltimore* county court is therefore affirmed.

DECREE AFFIRMED.

Williams vs. Hall.—1850.

JOHN W. WILLIAMS vs. RICHARD H. HALL.—December 1850.

A holder of a note which had been duly protested, and the liability of the endorser fixed by due notice, agreed with the maker to divide the amount of the note into three sums, for each of which a draft was to be drawn by the endorser upon the maker, in favor of the holder, payable on time, on the receipt of which drafts, accepted by the maker, the holder agreed to deliver up the note to be cancelled. The endorser assented to this agreement, and signed the drafts which were sent to him by the maker by whom they were subsequently accepted and delivered to the clerk of the holder, who (the clerk) thereupon informed the maker he could have the note whenever he called for it. Afterwards the holder finding that these drafts were not on stamped paper, informed the maker of the note of this fact, and told him he should expect other drafts, but gave no such notice to the endorser. No other drafts were given, and the note was never delivered up. **HELD:**

That the delivery of these unstamped drafts by the maker to the clerk of the holder, was not such a performance of the agreement as to discharge the endorser from liability on the note.

It was not, under this agreement, the duty of the holder to have the drafts stamped after they came to his possession, by complying with the provisions of the act of 1844, ch. 28, sec. 8.

APPEAL from Anne Arundel county court.

This was an action of *assumpsit* brought by the appellee as holder, against the appellant, as endorser of the promissory note referred to in the opinion. The plea was *non assumpsit*. All the facts of the case are fully stated in the opinion of this court. The verdict and judgment was for the plaintiff, and the defendant appealed.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

STOCKETT and ALEXANDER, for the appellant, insisted: 1st. That the note was satisfied by the agreement between the plaintiff and Selby, the maker of the note, and the drafts substituted in its stead. 2nd. That the omission to have the drafts stamped, was the neglect of the appellee, for which the

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appellant was in nowise responsible. 3rd. That failure of the appellee to make demand and give notice of the non-payment of the drafts, discharged the appellant from all liability on account of the same.

PRATT, for the appellee, insisted that the drafts being void at law, did not discharge the appellant of his liability on the note.

SPENCE, J., delivered the opinion of this court.

This is an action of *assumpsit*, brought by the appellee against the appellant, to recover from him on his endorsement of a certain promissory note to the appellee, of *John S. Selby*, for \$332.61, dated the 29th of October, 1844, and payable six months after date. The note not having been paid at maturity, was protested, and due notice of protest served on the appellant.

Afterwards an agreement was made between the appellee and *John S. Selby*, that said note should be divided into three parts, and for each of which drafts should be drawn by the appellant on said *Selby*, in favor of the appellee, dated the 15th of January, 1846, one for \$119.71, at four months; one for \$120.34, at six months; and the other for \$121.29, at eight months; and that on the receipt of said drafts by the appellee, accepted by said *Selby*, the said promissory note should be delivered up to the said *Selby*, to be cancelled. To this agreement the appellant assented, and on the receipt of said drafts with the statement from the appellee, the appellant signed them and sent them to *Selby* for his acceptance thereof, which was done by said *Selby*, and by him delivered to appellee through his clerk, who informed *Selby* he could have said promissory note whenever he would call for it. *Selby* failed to call for said note, and the same continued in the possession of the appellee. Afterwards, the appellee informed said *Selby* that said drafts were not stamped, and that he should expect other drafts, but no such notice was ever given to the appellant, nor was payment of said drafts, or either of them, ever

demand by said appellee of said *Selby*, or notice of their non-payment ever given to the appellant.

On the trial of this cause, the plaintiff prayed the court to instruct the jury, that if they believed the facts given in evidence by the plaintiff to be true, then the evidence offered by the defendant, if believed by the jury to be true, constituted no bar to the plaintiff's right to recover in this action.

Our inquiry now is, was there error in the direction given to the jury by the court? The appellant's indebtedness was fixed by the demand, proof of notice, and protest. Was this indebtedness on the part of the appellant discharged by virtue of the agreement entered into by the appellee with *John S. Selby*, as given in evidence on the trial?

This brings us to the consideration of the agreement, what was done under it, and the legal effect of what was done.

We have said that the indebtedness of the appellant had been fixed before the agreement set up. By the agreement the amount of the note was to be divided into three separate sums, and drafts to be given for each sum, one at four, one at six, and the third at eight months. Thus, by this agreement, time was given to the debtors, and no additional security to the creditor.

This case was argued upon the hypothesis, that these three drafts were legal in point of form; we shall not consider them in that character, but treat the drafts as we find them in the record. Did the receipt of these unstamped drafts discharge the appellant from his liability on the note in this suit? We think not. When delivered to the appellee's agent, they were in their then condition of no value, and the appellee might consider them as waste paper. Under the act of 1844, ch. 280, sec. 8, they were invalid, and unavailable for any purpose.

But the argument for the appellant insists, that the duty and obligation rested on the appellee to have these drafts stamped after they came to his hands, and after they had been excuted. To have done so, the appellant must have taken the oath and paid the ten dollars for each, as provided by the act of 1844, ch. 280, sec. 8. Is this the legal and reasonable interpreta-

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tion of the alleged agreement between *Hall* and *Selby*, that *Hall* would cancel and deliver up a debt of unquestionable validity, for three drafts, which were invalid and unavailable in law, unless at a cost to *Hall* of more than eight per cent. on the whole debt?

Such an interpretation would be not only contrary to equity, but to all the rules which govern in the interpretation of the acts and agreements of men. It would be to stultify one of the parties, and make the other a cheat. We can consider this agreement in no other sense than that the creditor was to give time, and to relinquish his evidence of a valid debt, upon receipt of other evidences of the debt equally valid in law, with time, as agreed between them.

It is therefore the opinion of this court, that the delivering of these drafts by *Selby* to the agent of *Hall*, was not such a performance of the spirit and intention of the agreement on his part, as discharged the appellant from his liability in this suit, and that the instruction of the court was correct.

JUDGMENT AFFIRMED.

THOMAS OREAR AND WM. C. BERKLEY, USE OF CLARK AND KELLOG, *vs.* SAMUEL McDONALD AND OTHERS, GARNISHEES OF MENIFEE AND SLAUGHTER.—*December* 1850.

A bill of exchange was not presented for payment, nor protested, until four days after its maturity. **Held:** That this presentment was not within a reasonable time, and the drawers were discharged.

Whether the circumstances of any particular case are sufficient to dispense with demand and notice, is always a question of law, addressed to the judgment of the court.

If the facts on which this question arises be admitted, or undeniable, then it is exclusively a matter of law, to be pronounced by the court, but if the facts be controverted, or the proof be equivocal or contradictory, then the court hypothetically instruct the jury as to the law.

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If the drawer had no effects in the hands of the drawee, from the time the bill was drawn until it became due, he is liable without proof of demand and notice.

But where the drawee has something equivalent to effects, or has made an express or implied agreement to accept and pay, or the drawer has any reasonable expectation that the bill will be accepted and paid, he is entitled to demand a notice.

The reasonable grounds required, are not such as would excite an idle hope or wild expectation, or a remote probability that the bill will be paid; but such as create a full expectation, a strong probability of its payment; such as would induce a merchant of common prudence and ordinary regard for his commercial credit, to draw a like bill.

There is no such stringent rule, as to require the drawee to have funds of the drawer in hand, at the maturity of the bill, sufficient for its payment, in order to entitle the latter to demand and notice.

If the drawer, at the time the bill should have been presented, had the right to expect, reasoning upon the state of facts connected with the transactions as they then existed between him and the drawee, that his bill would be honored, he is entitled to demand and notice.

The insolvency of the drawee, furnishes no excuse for the neglect of the holder, to demand payment and give notice of non-payment.

A bill for \$3000. was drawn under the authority and assent of the drawees, upon the faith of consignments, to be made to them by the drawers. The drawees were advised of the draft and of a particular consignment to meet it, and they promised to honor it when presented. The consignment was received by the drawees, and disposed of for \$7000, before the maturity of the draft. After consignments were afterwards made and other drafts drawn and accepted, so that at the maturity of the bill, the drawees had not funds sufficient to pay it, after payment of drafts subsequently drawn and accepted, **Held:** That under these circumstances, the drawers were entitled to demand and notice.

The laches of the holders discharged the drawers; and the bill cannot be given in evidence on the counts, for money had and received.

APPEAL from *Baltimore* county court.

This was an *attachment* sued out by the appellant, to affect the funds of *Meniffee & Slaughter*, in the hands of the appellees, as garnishees. The cause of action upon which the writ issued, was a bill of exchange, drawn at *New Orleans*, the 17th of December, 1842, by *Meniffee & Slaughter*, upon *Clark & Kellog* of *Baltimore*, for \$3000, payable to the order of *John W. Hunt*, at 70 days, and endorsed by *Hunt* to the appellants, *Orear & Berkley*. The garnishees appeared and pleaded *non*

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assumpsit for the defendants, and for themselves, *nulla bona* of defendants, in their hands.

The following are the prominent facts proved in the case: The draft matured on the 28th of February, 1843, but was not presented for payment, or protested, until the 2nd of March, 1843. The drawees, *Clark & Kellog*, had given the drawers, *Meniffee & Slaughter*, a written authority, to draw upon them for the usual proportion of goods, shipped by the drawers to them; that this usual advance was in 1842 '43, and since, three-fourths of the market value at *New Orleans*, of goods shipped thence. Under this authority, the drawers, between the 13th of December, 1842, and the 19th of January, 1843, made various shipments by the *Ponce*, the *Radius*, the *Adeline and Eliza*, the *Iowa*, and the *Abbey Baker*, the invoice value of which was, in the aggregate, \$17,428.68, against which, between the 17th of December, 1842, and the 4th of February, 1843, they drew bills to the value in the aggregate, of \$12,573.20, of these drafts, the one in suit was the second one drawn, and was drawn in anticipation of the shipment by the *Radius*. The drawees were advised of it, as also of the intended shipment by the *Radius*, by letter of the 19th of December, 1842, from the drawers, the receipt of which letter, the drawees acknowledged, and promised to honor said draft when presented. The shipment by the *Radius*, was received and disposed of by the drawees, by the 1st of February, 1843, for upwards of \$7000. The goods received by the various shipments, were disposed of by the drawees for a sum, sufficient, after paying every other draft on them by the drawers, including all drawn subsequent to the one in suit, to leave a balance in their hands, applicable to this draft. When this draft matured, there were large consignments in the hands of the drawees, which ultimately produced enough to pay all subsequent drafts, and leave a balance for this bill. The firm of the drawers was dissolved on the 8th of March, 1843.

The plaintiff upon this testimony, asked two instructions to the jury: 1st. That if the drawees had, between the date and maturity of the bill in suit, accepted other bills, drawn on them

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by *Meniffee* and *Slaughter*, and at the maturity of the bill, had no funds to meet it, after paying the other bills thereafter drawn and accepted, and that said drawees are now insolvent, then the not giving notice of non-acceptance and non-payment of the bill in question, till the 2nd of March, 1843, will not prevent the plaintiffs from recovering. 2nd. If the plaintiffs cannot recover on the bill, they may, under the circumstances, recover, as for money had and received for their use.

The defendant asked the following two instructions: 1st. That the demand of payment, on the 2nd of March, 1843, was not duly made, and does not charge the drawers of the bill. 2nd. That if this bill was drawn under the authority and permission of the drawees, upon the faith of consignments to be made to them by the drawers, which afterwards, and upon presentation of the bill for payment, were received by the drawees; and if, after the drawing of the bill, and before and at the time of its presentation for payment, the drawees had funds of the drawers in their hands, as shown by the account, offered in evidence by the plaintiffs, then the drawers are not liable, unless the plaintiffs prove due demand for payment and due notice thereof, or that there was some sufficient manner of demand and notice. 3rd. That there is no evidence of any due demand of payment, and due notice of non-payment by the drawees, nor of any service of said demand or notice.

The court, (ARCHER, C. J. and LE GRAND, A. J.,) granted the defendants' prayers and rejected those of the plaintiffs, who, the verdict and judgment being against them, appealed to this court.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

By WALLIS, for the appellants, and
By GEO. M. GILL and McMAHON, for the appellees.

The several prayers, clearly present the points urged in argument.

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MARTIN, J., delivered the opinion of this court.

This case comes before this court on an appeal from the judgment of *Baltimore* county court.

This case originated in an attachment issued by the appellants against the appellees, as garnishees, to affect the funds of *Menifee* and *Slaughter* in their hands, and the claim sought to be enforced by this proceeding was founded on a bill of exchange drawn by *Menifee*, and *Slaughter*, or *Clarke* and *Kellog*, in favor of *J. W. Hunt*, for \$3000, payable seventy days after date, and dated the 17th of *December* 1842, and of which the appellants were the holders. The garnishees appeared to this attachment, and pleaded *non assumpsit* by the defendants and *nulla bona* for themselves. The court below having rejected the prayers offered by the plaintiffs, and granted those presented by the defendants, the verdict and judgment were against the plaintiffs. From this judgment they have appealed, and the questions raised for our consideration by the record, are those which relate to the ruling of the court below, upon the points of law submitted for their decision.

The draft in this case was due on the 28th of February 1843. It is the unquestionable duty of the holder of a bill of exchange to which he impliedly assents upon receiving the bill, to present it for payment on the day of its maturity and to give notice to the drawer within a reasonable time of its non-payment. Any neglect or default in this respect, unless excused, affects the holder with *laches* and exonerates the drawer. It appears from the evidence offered at the trial of this cause by the plaintiffs, that this draft was not presented for payment until the 2nd of March 1843, four days after it reached maturity. Under such circumstances it is very clear, that if this comes within the operation of the general rule established by the commercial law, with respect to instruments of this character, the drawers would be considered as discharged. The correctness of this principle was not controverted by the counsel for the appellants. But it was contended, that there were no funds in the hands of the drawees to meet the draft; that the funds sent forward for this purpose were withdrawn and diverted from

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their original destination by the drawers, before the maturity of the draft; that with this knowledge the drawers could not have believed and had no right to expect that their draft would be paid, and that in this predicament of the case the usual requisition of demand and notice was unnecessary according to the principle enunciated in *Bickerdicke vs. Bollman*, 1 *Term Rep.*, 405, as being only a useless form not calculated to change or improve the condition of the drawers. This is substantially the proposition insisted on by the counsel for the appellants. And the questions propounded by the prayers for the decision of the court below, were whether the facts and circumstances of this case as shown by the evidence, amounted in legal contemplation to a dispensation of demand and notice, so as to subject the drawers to responsibility on the bill, and whether if they were discharged from liability on the draft, there could be any recovery against them on the count for money had and received?

Whether the circumstances of the particular case are to be treated as amounting to a dispensation of demand and notice, is always a question of law addressed to the judgment of the court. In *Cathell vs. Goodwin*, 1 *Har. and Gill*, 470, the Court of Appeals, when inquiring if the drawer had, in that case, reasonable grounds to expect that his bill would be honored, say; "The reasonableness of such expectation is a matter for the court and not for the jury to decide. If the facts upon which the question arises be admitted or be undeniable, then the question becomes exclusively a matter of law to be pronounced by the court; but if the facts be controverted, or the proof be equivocal or contradictory, then it becomes a mixed question both of law and fact in which case the court hypothetically instruct the jury as to the law to be by them pronounced, accordingly as they may find the facts."

We proceed, therefore, to examine the facts in this case, in reference to which there is no dispute, or found by the jury to be true under defendants' prayers; but before this is done it is necessary to ascertain with precision the rule of law by which the case is to be governed as it has been explained, modified

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and restricted by the courts since the decision pronounced by the court of the Kings Bench in 1786, in *Bickerdicke vs. Bollman*, 1 *Term Rep.* 405. A reference to a few of the leading cases will be sufficient for this purpose.

In *Claridge vs. Dulton*, 4 *M. and Selw. Rep.*, 230, Lord *Ellenborough* said; "That where there were any funds in the hands of the drawee, so that the drawer has a right to expect or even where there are not any funds, if the bill be drawn under such circumstances as may induce the drawer to entertain a reasonable expectation, that the bill will be accepted and paid, the person so drawing it, is entitled to notice." And *Mr. Justice Le Blance*, also said: "That it is not necessary that the drawer should have effects or money in the hands of the drawee, either at the time the bill is drawn or when it becomes due. For if the bill be drawn in the fair and reasonable expectation, that in the ordinary course of mercantile transactions it will be accepted or paid when due, the case does not range itself under that class of cases of which *Bickerdicke vs. Bollman*, is the first."

The rule of law on this subject, is stated with great clearness and precision by SHAW, C. J., in *Kinsley vs. Robinson*, 21 *Pick*, 328. He says:

"It seems to be now the settled rule of law in an action by the indorsee against the drawer of a bill of exchange, if it appear that the drawer had no effects in the hands of the drawee from the time the bill was drawn till the time it became due, he is liable, without proof of demand and notice. But this is to be taken with some exception of special cases where the drawee has something equivalent to effects, or has made an express or implied engagement to accept and pay, or the drawer has, on any ground, a reasonable expectation that the bill will be accepted and paid. *Dickens vs. Beal*, 10 *Pet.*, 577."

In *Clopper vs. the Union Bank*, 7 *Har. & John.*, 102. The Court of Appeals when speaking of this rule, said, "a drawer who has no effects in the hands of the drawee, and has no reason to expect the bill would be paid when it became due, is not entitled to notice." Again, this court, in *Eichelberger vs.*

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Finley, 7 Har. & John, 386, declared, “that the true rule, applicable to cases of this kind, appeared to be, that notice is dispensed with where the drawer, at the time when presentment should be made, had no effects in the hands of the drawee, or having such effects should withdraw them before presentment, and in neither case should have any reasonable grounds that his bill would be honored.” And in the subsequent case of *Cathell vs. Goodwin, 1 Har. & Gill, 471*, the court, in defining what are the reasonable grounds required in such cases, by law, announce:

“That they are not such as would excite an idle hope, a wild expectation, or a remote probability, that the bill might be honored, but such as create a full expectation, a strong probability of its payment; such, indeed, as would induce a merchant of common prudence and ordinary regard for his commercial credit to draw a like bill.”

The authorities to which we have referred, furnish us with the rule by which this case is to be decided. The right to demand and notice, does not depend upon the fact, that the drawers had, at the maturity of the draft, funds in the hands of the drawers, as ascertained by ulterior events, adequate to its payment. There is to be found in the adjudications on this subject, no such stringent rule. On the contrary, we consider the principle as now established, to be, that if the drawers, at the time when the bill should have been presented, had the right to expect, reasoning upon the state of facts connected with the transactions as they then existed between the drawers and themselves, that their bill would be honored, they were entitled to demand and notice. The drawing of a bill under such circumstances, is not to be treated as a fraud. And as the transaction before us is to be tested by this rule, we think it very clear, that a case is presented in which demand and notice were indispensable; for we are satisfied, after a careful examination of the facts, in reference to which there can be no dispute, that the drawers of this bill, throughout the entire period from the drawing of the draft up to the time when it became due, acted under the full expectation, honestly en-

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tertaind, and based upon reasonable grounds, that it would be paid by the drawees at its maturity. We will state some of the principal reasons by which we have been conducd to this conclusion.

That *Meniffee & Slaughter* had the authority and permission of *Clarke & Kellog* to draw this bill of exchange upon the faith of consignments, cannot be questioned. It was directly proved by *Poumairot*, and recognized by the letter, to which he referred in his deposition, as well as by the letter of the 7th of January, 1843. It is true, that this authority was limited to three-fourths of the market value of the cargo at New Orleans. With respect, however, to the first draft, this agreement was not strictly adhered to; and the argument is, we think, legitimate, that this fact was calculated to impress upon the mind of the drawers the belief that the drawees would deviate from the strict letter of their authority, if it became necessary for the honor of the bill.

This bill was drawn on the 17th of December, 1842. On the 19th of the same month, the drawees were advised of this draft, and of a shipment by the *Radius* to meet it. A bill of lading, operating as a transmutation of the legal title from the drawers to the drawees, for one hundred hogsheads of sugar by the *Radius*, was also forwarded. The record shows, that this shipment by the *Radius*, was received and sold on time, for a sum exceeding seven thousand dollars, prior to the maturity of this bill. And we have the pregnant fact in the letter of *Clarke & Kellog*, referred to by *Poumairot*, and placed in the cause without objection; that the drawees acknowledged the receipt of the letter of advice of the 19th of December, and promised to honor the draft when presented. This promise may be regarded as equivalent to an acceptance of the draft. It has been urged, however, on the authority of the case of *Hoffman vs. Smith*, 1 *Caines' Rep.*, 157, that the acceptance of the bill does not render notice of non-payment necessary in a case where there were no funds. This may be true; but all must agree, that on the question, whether the drawers had the right to expect that their draft would be hon-

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ored, it is a fact of the most commanding character. It rests on the plain proposition, that the drawers could not presume that the drawees would violate or evade their express engagement. And as a circumstance calculated to generate in the minds of the drawers the belief that their draft would be paid, it may be considered as conclusive, unless mitigated or explained.

It cannot be maintained that *Meniffee* and *Slaughter* are to be treated as having fraudulently intercepted the funds against which this bill was drawn by their subsequent drafts, so as to place this case within the range of *Rhett vs. Poe*, 2 How., 457. There is no similitude between the cases. In the case before us, large shipments were made to meet the subsequent drafts. These drafts although accepted were not paid prior to the maturity of this bill.

It is very manifest, we think, that the parties to this draft, both the drawers and drawees, contemplated that the shipment by the *Radius*, or so much of it as might be necessary, should be appropriated to its payment. We do not mean to say, that there was a technical appropriation of the fund produced by the sale of this cargo to this draft, but that this was the expectation of the drawers, as it certainly was the intention and purpose of *Clark* and *Kellog*. And it is therefore a fair inference, that if the shipments forwarded to meet these various drafts had proved inadequate, so that some of them would have remained unpaid, that the drawees looking to their express promise to pay this draft, and the implied understanding, that it was to be answered by the cargo of the *Radius*, would have honored it, had it been duly presented it even at the sacrifice of some other draft. Be this however as may, it is impossible we think, to doubt with this array of facts before us, that the drawers of this bill, both at the time when it was drawn and at the period of its maturity, had reasonable grounds for the expectation that it would be honored. They were therefore entitled to demand and notice, and the court below were correct in rejecting the plaintiffs' first prayer, and in granting the prayers of the defendants.

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The condition of the case, as to the right of the drawers to demand and notice, is not altered by the fact assuming it to be true, that the drawees were insolvent. The insolvency of the drawees, furnished no excuse for the negligence of the holders of the bill, in this respect.

Story on Bills, sec. 306. Byles on Bills, 148.

The plaintiffs' second prayer, raises the question, whether there can be any recovery against the defendants on the money counts, assuming that they were discharged from liability on the draft.

The court below were clearly correct in rejecting this prayer. There was no money paid by the drawees to the drawers for the purpose of being applied to this bill. As in *Baker against Birch*, 3 *Camp. Rep.*, 107. In *Penn vs. Flack*, 3 *Gill and John.*, 369, the note was exhibited and relied on as evidence under the money counts of an indebtedment between the parties. But in this case, the drawers are absolved from responsibility on the draft, by the *laches* of the holders. And *Judge Story in his Treatise on Bills*, when speaking of the obligation to present the draft for payment as soon as it has arrived at maturity, states the rule to be: "That a default in this respect, will discharge the party, in respect to whom there has been any such default, and who otherwise would be bound to pay the same, from all responsibility, on account of the non-acceptance or non-payment of the bill, and will operate as a satisfaction of any debt or demand or value for which it was given." *Sec. 112 and sec. 227.*

JUDGMENT AFFIRMED.

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By the act of 1798, ch. 101, sub-ch. 13, a widow may become entitled to dower after having accepted a devise in the will, in lieu of dower, provided nothing passes by such devise, but in such cases there must be clear proof that the provisions for her in the will is of no value.

Where a testator devises land which he had previously mortgaged, and charges it in the hands of the devisee, with a provision for his wife in lieu of her dower, which provision the widow accepts, and the land is sold to pay the mortgage debt, she may have a preferred claim upon the surplus proceeds of sale, as against the devisee, but she has no claim against the mortgagee.

A widow has no claim under her husband's will to lands which he had previously mortgaged, and which it becomes necessary to sell to pay the mortgage debt; she is entitled to dower in the mortgaged land, but if she elects to abide by the will, she has no longer any claim to the land.

No offer by the husband, though accepted by the wife, will deprive a mortgagee of his security; they cannot make mortgaged premises answerable for the widow's claim for dower in other lands.

A widow may recover dower before foreclosure of a mortgage, but after the sale of the mortgaged premises, she has no claim.

An annuity given by will to a widow in lieu of dower, became payable in 1818. No part of this was paid, and no legal steps taken to enforce its payment until 1846, when the widow filed a bill claiming the whole amount of the annuity, with interest, as a charge upon the lands, (now in the hands of *bona fide* purchasers,) devised to the parties, who were, by the will, required to pay it. **Held:** That laches and lapse of time, was an effectual bar to the claim.

The fact that she did not know that this annuity was a charge upon the lands until 1839, when she was informed of it by a decision of the Court of Appeals, will not excuse her delay and neglect to proceed against the parties personally responsible for the payment of the annuity.

A lapse of twenty-five years from the inception of title, a delay entirely unexplained and without any claim whatever in the intermediate time being made, is an effectual bar to a claim for rents and profits.

The case of *Sellman vs. Bowen*, 8 G. & J., overrules the case of *Steiger's Adm'r, vs. Hillen*, 5 G. & J., 121, only in so far as the latter case, countenances the doctrine that a widow may, at law, recover from the alienee of her husband, damages for the detention of her dower.

Nothing else said in the case of *Steiger's Adm'r, vs. Hillen*, is questioned, and that case, so far as the law relating to laches and lapse of time is con-

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cerned, is affirmed by the case of *Kiddall vs. Trimble, Exc'r of Jacob*, 8 Gill, 207, and by this case; such ought now to be considered settled law in Maryland

APPEAL from the *Court of Chancery*.

This appeal was taken from a decree of the chancellor, (JOHNSON,) passed on the 7th of December, 1848, dismissing the bill of the appellant's testatrix, the complainant below. The following are the facts of the case as shown by the record:

Jacob Gibson, late of *Talbot* county, died in January, 1818, seized of large and valuable real estate, leaving a widow, *Rebecca Gibson*, the testatrix of the appellant, entitled to dower therein, and leaving also a last will and testament, duly executed on the 29th of November, 1817, to pass real estate, unrevoked at the time of his death, which was regularly admitted to probate by the orphans court of the said county, on the 13th of January, 1818. In this will the said *Gibson*, after sundry devises of his property to his several children, and particularly of real estate to his sons, *Edward R. Gibson* and *Fayette Gibson*, devised to the said *Rebecca Gibson*, during her widowhood, "the use, occupation and enjoyment of one moiety or half-part of his dwelling house, or one half-part or moiety of the dwelling house bequeathed to his son, *Fayette*, which he purchased of the *Hughes'*, and lying in *Miles River Neck*; and also one-half of the use of the kitchen, garden, out-houses belonging to either of the aforesaid farms or plantations, whichever she might chose, at any time to live at during her widowhood aforesaid." He also directs his sons, "*Edward R. Gibson* and *Fayette Gibson*, their heirs and assigns, to furnish the said *Rebecca* with sufficient fire-wood off the lands bequeathed them, so long as she might remain in either of the houses aforesaid; the wood to be cut and delivered at the door, prepared for her use as fuel generally is." He also gave to the said *Rebecca*, sundry negroes for her life, and various articles of personal property, including "two horses and two cows, with the privilege of pasturage for them on the plantation she might from time to time choose to reside at, with the

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use of the stables and provender of all kinds for them, during the year or years she may live." In a subsequent clause, he "gave and bequeathed to the said *Rebecca* \$500 annually, whilst she remained his widow, to be paid to her by his two sons, *Edward R. Gibson* and *Fayette Gibson*, by them or their heirs jointly, \$250 by each of them; but if she should marry, they were to pay her only one-half of that sum, equally between them." The said *Gibson* then declared the foregoing bequest and devise to his wife, the said *Rebecca*, "to be in lieu of, and full satisfaction for her dower in his lands and real estate, and her thirds of his personal estate, and remainder of both his real and personal estate not before devised or disposed of."

Previous to the execution of this will, viz: on the 25th of May, 1813, *Jacob Gibson* mortgaged his estate called "*Marengo*;" which includes the lands devised by him to *Edward R. Gibson* and *Francis Tilton*, and that portion of his estate devised to *Fayette Gibson*, which was by him afterwards sold to *Edward Gibson*, to the appellee, *The Farmers Bank of Maryland*, to secure a debt due by him to said bank, amounting at that time to \$13,720.

Rebecca Gibson, the widow, accepted the provisions of the said will in her favor in lieu of her dower, within the time required by law, and *Edward R. Gibson* and *Fayette Gibson* entered into possession of the real estate devised to them respectively, and particularly described therein. *Fayette Gibson*, in 1821, sold his portion of "*Marengo*" to *Edward Lloyd*, for \$7,025, by whom it was subsequently devised to his son, *Edward Lloyd*, and the estate known as "*Lombardy*," to one *John Wilson Blake*, for \$10,500, after whose death it was again sold, and subsequently one portion came into the possession of *James Hopkins*, and the residue was held and owned by *Charlotte L. Edmondson*, as tenant for life, with remainder to *Horatio L. Edmondson*. *Edward R. Gibson*, in 1822, sold the estate devised to him, being part of "*Marengo*," to *Fayette Gibson*, for \$22,344, in whose possession it continued up to the 29th of March, when it was purchased by

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the *Farmers Bank of Maryland*, under a decree passed in the case of *McCormick vs. Gibson*, for the sale of the real estate of *Jacob Gibson*, for the payment of his debts, his personal estate having proved insufficient for that purpose, at the sum of \$10,500.

The bill in the case of *McCormick vs. Gibson*, was filed by *James McCormick, Jr.*, in 1824, and resulted in a decree passed by the Court of Appeals on the 9th of February, 1839, affirming in part and reversing in part the decree of the chancellor, (BLAND,) directing a sale of the real estate of *Jacob Gibson*, for the payment of his debts. The Court of Appeals decreed that the sale should be made subject to the rights of *Rebecca Gibson*, the widow of the deceased, and in their opinion said : “The decree of the chancellor makes no reservation of the rights of the widow under the will of *Jacob Gibson*, but declares that the purchasers from the trustee shall hold the property sold to them, free, clear, and undischarged from all claims of the parties to this cause, of which *Rebecca Gibson*, the widow, is one. To conform to the act of Assembly, the decree should have ordered the sales to be made by the trustee, subject to the devises made to *Rebecca Gibson*, by the last will and testament of the deceased. There is no intimation in the bill or proof in the cause, that the provision made for the wife is fraudulent in being greater than the value of her common law rights, and therefore unjust and injurious to creditors. She is therefore entitled to the benefit of all the bequests and devises made to her by the will, as a purchaser for a fair consideration.” (10 G. & J., 113.)

About the time of its purchase, in 1839, the bank leased the land to *Fayette Gibson*, (who, under said lease, remained in possession until his death,) and on the 1st of January, 1841, sold a portion of its purchase to one *Kennedy R. Owen*, who entered into possession of the same.

On the 10th of June, 1846, *Rebecca Gibson*, the widow, filed her bill in the court of chancery, against all the parties just named, as in possession of, or claiming title to, the estates devised to the said *Echoard R.* and *Fayette*, setting forth the

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facts aforesaid; averring that she had continued, ever since the death of *Jacob Gibson*, unmarried, and his widow, claiming the benefit of the bequests and devises in her favor, as liens upon the said estates, averring them to have been, and to be, far less in value than her dower interest; and that by her acceptance thereof, all persons interested in the estate of the said *Jacob* had been greatly benefitted; alleging that no part of the said \$500 had at any time been payed to her by the said *Edward* or *Fayette*, or any or either of their assignees, or by the said bank, but that the same, with interest from year to year, amounting on the 1st of February preceding, to the sum of \$24,140, was still due and unpaid, and admitting that she had lived and was then living with her son, the said *Fayette*, on the estate devised to the said *Edward R. Gibson*, charging that her board had not been equal in value to the privileges to which, during that period, she had been entitled, but had abstained from claiming, or had not received.

The bill further claimed, that by not renouncing the said will, she became a purchaser for a fair and full consideration of the several devises to her, and charges, that if the said devises be not a trust in her favor, binding upon the said estates, there has been an utter failure of such consideration, and she is, therefore, entitled to dower in the said lands, and damages for the rents and profits due to her from the death of her husband; that *Edward R. Gibson* became and acted as executor of the said *Jacob Gibson*, the other executors having renounced, but that he has departed this life, insolvent, and entirely without assets, and that neither upon his estate, nor upon that of the said *Jacob*, have letters of administration been since taken out; that the insufficiency of the personal estate of the said *Jacob Gibson*, for the payment of his debts was fully shown in the case of *McCormick vs. Gibson, and others*, wherein all the parties to this suit, or those under whom they claim, were defendants, and that the decree for the sale of said *Gibson's* real estate, under which the said bank purchased, expressly reserved the rights of the said *Rebecca*, and required such sale to be made subject thereto; that the said *Edward R.*

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Gibson possessed no means or property out of which the said charge of \$500 a year could have been paid, other than that part of *Marengo* devised to him as aforesaid, and afterwards sold to the said *Fayette*, and that after the purchase aforesaid, by the bank, the said *Fayette*, as well as the said *Edward*, was entirely without means; and utterly unable to pay the said annual charge, the proceeds of the sales of the estate having been applied to the payment of the debts of the said *Jacob*; and concludes by praying a sale, subject to the said *Rebecca's* habitation right, and the privileges connected therewith, of the estates devised to the said *Edward R.* and *Fayette Gibson*, for the payment of the said charge of \$500 a year, and all arrearages thereon, with interest, and asking that the residue of the proceeds of sale may be set apart and invested in such manner as to pay the said *Rebecca* the said sum of \$500, annually, during her widowhood.

The answers of *Edward Lloyd*, the bank, *Kennedy R. Owen*, and *Horatio L. Edmonson*, all insist that the provisions in the will of *Jacob Gibson*, in favor of his wife, constituted no lien upon the estates devised to *Edward R.* and *Fayette Gibson*, but a mere personal charge upon these devisees; that by accepting these devises, and actually receiving and enjoying the benefit of the provisions contained therein, she renounced all claim to dower, if any she ever had, and has precluded herself from reinstatement to any such right, the bank, *Owen* and *Edmonson* also insisting, that if she can claim dower in any part of her husband's estate, she has failed to make the necessary and proper parties to her bill, and to tender herself ready to account for and refund the value of the various privileges enjoyed by her, and of the annuity paid to her, as she should have done; that *Edward R.* and *Fayette Gibson* paid to *Rebecca Gibson* the annuity of \$500, as it became due, and supplied all the privileges to which she was entitled, or paid her a full equivalent therefor, and that she had executed to them full acquittances and releases, which enure to the benefit of all the said respondents; that they, or those under whom they claim, were purchasers for a full and valuable consideration,

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without notice, *Lloyd* and *Edmonson* claiming that the purchase money for the lands held by them was applied, in whole or in part, to the payment of the debts of *Jacob Gibson*, deceased, and the said defendants, other than *Lloyd*, insisting, that by the laches of *Rebecca Gibson*, they have lost the remedy which they would otherwise have had against *Edward R. Gibson* and *Fayette Gibson*, by virtue of the general warranty in the deed from *Edward* to *Fayette*, under whom the bank and *Owen* claim, and in that from *Fayette* to *John W. Blake*, under whom *Edmonson* claims, the said *Fayette* having become utterly insolvent, and the said *Edward* having died in like condition, and entirely without assets; all these answers assert that no claim had been set up by *Rebecca Gibson* until the filing of this bill, and rely upon her gross neglect and laches, lapse of time and limitations, as full and complete defences thereto. The bank admits, as do all the said defendants, except *Lloyd*, the insufficiency of the personal estate of *Jacob Gibson* for the payment of his debts. The answer of *Edmonson* asserts, that under the decree in the case of *McCormick vs. Gibson*, the heirs of *John W. Blake* paid a contribution of \$200, or more, towards the debt of the said *McCormick*, and avers, that he owns but a part of the land sold by *Fayette Gibson* to the said *Blake*.

After the answer of *Edmonson*, the bill was amended, by making *Hopkins* the owner of the residue of the land sold by *Fayette Gibson* to *Blake*, a party, and *Hopkins* filed his answer, claiming to be a purchaser for a valuable consideration, without notice of the complainant's claim, relying upon the answers of the bank, *Owen*, and *Edmonson*, and adopting them as his own.

At the July term, 1847, after the general replication had been entered to the answers filed, and commissions-in-chief to take testimony had been issued, the death of the complainant, *Rebecca Gibson*, was suggested; and thereupon, upon proper proceedings for that purpose, *Samuel Chew*, her executor, was admitted complainant in her stead, and the cause revived.

The will of *Rebecca Gibson*, which was filed in the cause,

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was duly executed on the 4th August, 1846, and admitted to probate according to law. By it, after bequeathing to one of her grand-daughters, a negro woman and two children, the testatrix authorises her executor to compromise with the defendants to this suit, or others against whom she may have claims for moneys due to her under the will of the said *Jacob Gibson*, or for rents and profits by reason of the detention of her dower, in case they or any of them should desire a settlement without awaiting a final decree against them, and particularly desiring him, in such event, to settle, in a liberal manner, with the *Edmonsons* and *Lloyd*, and the owner or owners of the lands then occupied by them, formerly belonging to the said *Jacob Gibson*; and after providing for payment of the counsel fees incurred, or to be incurred in the prosecution of such suit, devises the residue of her estate, including the moneys to be recovered in said suit, to her executor, *Samuel Chew*, in trust, for the separate use of *Mary C. Gibson*, wife of *Fayette Gibson*, during her life, and after her death for the said *Fayette*, during his life, and after the death of the said *Mary* and *Fayette*, in trust for such of the children of the said *Mary* and *Fayette* and of the said *Fayette* as may be living at the death of the survivor, until they shall respectively arrive at age, or until the marriage of the females; the children of any deceased child to take the place of their parent; and confers certain powers on said trustee in relation to the management of the said estate.

A large mass of testimony was taken under the commission, the purport of which sufficiently appears from the preceding statement, and will also be found in the opinion of the chancellor pronounced upon the passage of his decree, dismissing the bill reported in *2nd Md. Chancery Decisions*, 231.

The cause was argued before SPENCE, MAGRUDER and MARTIN, J.

HAMMOND and McLEAN, for the appellants, contended.

1st. That the provisions in the will of *Jacob Gibson*, in favor of *Rebecca Gibson*, were each and all of them charged

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upon the estates devised by him to his sons, *Edward R.* and *Fayette Gibson*.

2nd. That *Rebecca Gibson*, by virtue of her acceptance of such provisions, in lieu of dower, became a purchaser of the same for a fair consideration, and is therefore, entitled to have them enforced in her favor, or in default thereof, the consideration having failed, and nothing having passed by the devise, to be remitted to her dower right in the whole estate of *Jacob Gibson*, the devisor.

3rd. That this devise, being in lieu of dower, and a lien upon the real estates charged, as contended in the first point, is, like the claim of dower at law, exempt from the operation of the statute of limitations; and

4th. That the defence of lapse of time cannot avail against the claim set up in the bill, the complainant having been in law and equity justly entitled to its enforcement, and her apparent *laches* being explained and sufficiently accounted for by circumstances disclosed in the proceedings.

RANDALL, MURRAY and ALEXANDER, for the appellees, insisted.

1st. That this annuity given by *Jacob Gibson's* will to his widow, the complainant, for life, to be paid jointly by his sons, is a mere personal obligation, and not a charge upon the land.

2nd. If not, the parties all so considered it; acted as if it was no lien on the land, in their dealings with the land; the complainant knowing this, and setting up no opposition to it, after the acquisition of rights, under this belief, by others, she cannot disturb them by setting up this claim for arrearages of this annuity, on the lands purchased of her sons.

3rd. That if such a lien does exist, it can be enforced against purchasers for a valuable consideration only from demand made on them—and without interest.

4th. That the statute of limitations will bar the claim of the complainant.

5th. That *laches*, lapse of time, &c., will bar the claim of the complainant.

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6th. Especially in this case, the circumstances and facts of which show no equity in the complainant against the defendants.

7th. That the complainant has actually released this claim, if it ever existed, against the land, in the releases she gave to *Fayette Gibson* and *Edward R. Gibson*, which enure to the benefit and protection of the appellees.

MAGRUDER, J., delivered the opinion of this court.

This is an appeal from a decree of the court of chancery, dismissing the bill of the appellant.

He is the executor of *Rebecca Gibson*, the widow of *Jacob Gibson*, who died in January 1818.

The testator, it appears, died the owner of a large estate, and by his will left to his widow, personal property, some privileges, and also \$500 payable to her annually by her two sons, to whom in various parts of his will he devised a large estate. This provision made for the widow, was expressly declared to be in lieu and satisfaction, both of her dower and of her thirds of the personal estate. Of this provision she accepted.

On the 10th of June 1846, she filed this bill of complaint, and alleges that she has received no part of the annuity thus given her; insists that the real estate devised by her husband to her two sons, *Edward* and *Fayette*, is charged with the payment of the annuity, and asks a sale of the real estate devised to them for the payment of what is now due, and to secure the payment of the annuity, as it may hereafter become due.

The persons who were in possession of the estate devised to *Edward* and *Fayette Gibson* at the time when the bill was filed, are all of them made defendants. The widow being since dead, the appellant as her executor was made the complainant in the court below.

In the argument of this case it has been insisted, that as both *Edward* and *Fayette Gibson* are dead and insolvent, unless the real estate devised to them be made answerable for the annuity, she cannot receive that which she agreed to accept in lieu of dower, and ought to have dower allowed to her.

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It would seem to be a sufficient answer to this to say, that the bill of complainant is not so framed as to make it a subject of inquiry in this case, whether and upon what terms, she is entitled to dower.

No doubt a widow after accepting the provision made for her in her husband's will, may become entitled to dower. Such is the law, because the act of 1798, ch. 101, sub-ch. 13, makes it to be law. That sub-chapter first provides that if the devise of other real and personal estate, or of both, shall be expressly in lieu of her legal share of one or both, she shall accordingly be barred, unless she renounce as aforesaid. What is given to this widow by the will is expressly given in lieu of her dower and interest in the personal estate. This provision made for her, she expressly accepted.

A widow cannot be compelled to accept of the provision in the will in lieu of her dower, but having accepted of it she cannot in all cases claim dower in lieu of that provision. Whatever right she has to claim dower afterwards, she must derive from the law, and this is to be found in the same sub-chapter and in these words, "if in effect nothing shall pass by such devise she shall not thereby be debarred whether she shall or shall not renounce." It is understood that in asking to be endowed of any part of the real estate of her husband, she relies on this clause of the act of 1798. If so, there must be satisfactory proof that her case comes within this provision of the act of Assembly. She agreed to take the property bequeathed to her, and \$500 per annum, payable by her two sons, with some personal property and certain privileges, in lieu of her dower and thirds. Did nothing pass by these provisions in the will? Was the annuity payable by the sons, valueless at the time she agreed to accept it? What were the privileges worth to her? What personal property did she receive? These are questions, proper to be settled if the widow in this case had expressly claimed dower, notwithstanding her acceptance of the provision made for her in lieu of her dower. But she is not in court to make known to us, that nothing passed to her by the devise. It is true it is suggested that if she could say so, then she

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would have a right to demand dower. All her *allegata* however go to show, that if she is not to suffer by reason of want of due diligence, there is an ample fund in real estate to satisfy every cent which she claims, and to which she can have no claim, while she can ask for dower. We must say then that dower, or damages for the detention of her dower, cannot be awarded to her representative in this suit.

Is she entitled to all or to any part of the annuity left to her by her husband's will, and to claim that the estate devised to the two sons be charged with the payment of it in the hands of those who now own it? This we are next to decide.

The present owners of this land are to be considered *bona fide* purchasers for valuable consideration. It is true there is some testimony designed to satisfy us, that the *Farmers Bank of Maryland* purchased a part of it at something below its value. The answer to all this is, that such an investigation as this would lead to, is entirely out of place here. If any person interested in the estate had any objection to the sale, the objection ought to have been made at the proper time. The sale being ratified, and all persons having acquiesced in it, it is not now to be inquired whether a better price might not or ought not to have been obtained. To be sure, the land was purchased subject to all the rights and privileges of the widow. And this seems to be a proper place to inquire whether this particular land when sold, was subject to any claim of the widow.

The real estate which was devised to *Edward* and *Fayette Gibson*, and which it is thought was charged with the payment of this annuity, consisted principally of land which had been previously mortgaged by the testator to the *Farmers Bank of Maryland*. The debt intended to be secured being unpaid, a decree was obtained in the court of chancery, for the sale of the mortgaged premises, and at this sale the bank became the purchaser of the land devised to *Edward Gibson*. Now what interest in this land was charged, (if the widow had any lien upon it) with the payment of this annuity? Certainly, only that which a mortgager has a right to devise, and a mort-

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gagor can only devise the equity of redemption. If the debt, which the mortgage was designed to secure, had been paid off without any sale of the mortgaged premises, then to be sure, the devisee would have had a more valuable estate than the equity of redemption, and the widow's security for her annuity, (if the land was by the will charged with the payment of the annuity,) would have been improved. But the land was sold to pay the debt, for which it was previously mortgaged, and when sold, there remains no equity of redemption as a security for the annuity. If the fund brought into chancery by the sale of this, and the rest of the mortgaged premises, had been more than sufficient to satisfy the mortgage, then to that surplus the widow might have preferred a claim, in opposition to the claim of the devisee. See *1st John. Chy. Reports*, 45.

But there was no surplus, and no longer any equity of redemption, and of course, so far as it concerns this estate purchased by the bank it is needless now to inquire whether the will did or not charge it with the payment of the annuity.

There is to be sure some difference between the sale to the bank by the court's trustee and that made of other parcels of the land mortgaged. But we cannot discover in this record, or in any of the proceedings in any other case to which we have been referred, that to the other parcels of land conveyed by the mortgage deed, she would now have any claim.

Surely it cannot be insisted, that because the widow is to be deemed a purchaser for a valuable consideration, she could take under her husband's will any land, which her husband had previously mortgaged, and which it became necessary to sell in order to pay the mortgage debt. She might have been entitled to dower in the land mortgaged, but she agreed to take what her husband agreed to give, in lieu of her dower, and she can no longer claim that which she had relinquished, unless in the case spoken of in the act of 1798, and then she must show that hers is such a case, and cannot well show it in a bill filed expressly to recover that which she agreed to take in lieu of her dower in this as well as the rest of the real estate. No offer by the husband though accepted by the wife, will deprive a

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mortgagee of his security. They cannot make mortgaged premises answerable for the widow's claim to dower in other lands.

We have been required in the course of the argument to assume that the widow was rather more ignorant than the law will allow her to be. When such a devise is given, and expressly declared to be given in lieu of dower, a widow is called upon to determine, and is allowed what the law deems ample time to determine whether she will accept in lieu of her dower that which her husband offers to her. The presumption is that she gets the necessary information, takes proper advice, and knew what she was to receive and what she gave up. In this very case we cannot doubt that she relinquished her dower for a very inadequate price. But because of this, she cannot claim her dower after she has relinquished it.

The court has been frequently referred to expressions which are to be found in a former decree of this court. The real estate of which *Jacob Gibson* died seized, was directed to be sold subject to the devises to the widow. These words it is thought recognise, if they do not establish, something very much in favor of the appellant.

The decree alluded to was passed for the sale of so much of the real estate of *Jacob Gibson*, as was necessary to pay his debts of every description. How much of that estate or what part of it would be sold for the purpose, the court could not then determine. Certainly in sales made for the benefit of other creditors than those who had mortgages, the court could not interfere with any of the legal rights and privileges of the widow. Surely the court could not mean by the words repeated to us, that the testator by his will had given to his widow rights which she might claim, though thereby the security of the mortgagee was destroyed, or even impaired.

It sometimes indeed happens that the same question will come up for the decision of the court, when, indeed, the facts are so different as to require, apparently, a different decision. A widow may recover dower before foreclosure, though after the sale of the mortgaged premises, it must be pronounced that she has no claim. 5 *John. Chy. Rep.*, 452.

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There is, however, one defence to this claim, a decision of which, in favor of the appellees, will render unnecessary an examination of other points which have been argued.

This bill was filed on the 10th day of June, in the year 1846, and it is designed to assert a claim to an annuity, payable ever since the year 1818, and no part of which, it is alleged, has ever been paid, and to recover which no legal steps appear to have been taken.

It is said in answer to this, that the widow was not apprized, until the decision of this court in 1839, that the land devised to her two sons, *Edward* and *Fayette*, was charged with the payment of her annuity. She then agreed to accept, (in lieu of her dower) of \$500, for which the sons were personally responsible, and without any suspicion that she had the security on which she now relies.

But the objection is not that she did not proceed against the land devised to the sons, and which might or might not be answerable for the annuity, but that she never made an effort to recover that annuity of her debtors, who, according to the case of *West and Biscoe*, 6 H. & J., 460, were personally responsible. The land devised to her two sons, may or may not be chargeable with this annuity while it is to be paid, but is certainly no security for its payment, when for any reason it is presumed no longer to be due. The annuity is the *debt*, the sons are the debtors, and any security which the creditor had for the payment of it, ceases to be such, whenever the debt is proved, or presumed to be paid.

For many years after the same was payable, it is not denied, that the persons who alone were bound to pay it, were able. If we look at the proof in the record, we are brought to the conclusion, that years before the filing of this bill, the widow chose to have, and to acknowledge that she had, no claim against her children, though subsequently, she would seem to be willing to make, if she could, the land devised to them, answerable, after it had been sold to *bona fide* purchasers.

She relies upon ignorance of her title, and it is thought, that until this *disability* is removed, she was not obliged to assert

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her title. We are told, however, that the purchasers who bought without notice, had notice, because the will in the orphans court was notice to them. But was not she equally bound to take notice of the will and proceedings upon it in the orphans court? Had she not actual notice of her own act in that court, the acceptance of the provision made in the will for her, which it is said, gave to her this right to charge a portion of the real estate with the annuity, which was taken as an equivalent for her dower in the whole of the real estate?

She did not sleep upon her rights, it is said, and this because, until this court in 1839 instructed her otherwise, she was not aware that she had the right which she would now assert. But did not the self-same decree which thus instructed her, also apprise her, that the whole of her late husband's real estate, if needed, was about to be sold for payment of his debts? The objection is not so much to her failing to disclose the existence of her lien, as of the amount of her claim against her sons, an amount which nobody is bound to know, unless she herself thought proper to disclose it. Yet when she is heard to say any thing about her claim against her sons, she speaks of it, not indeed as a claim which never had existed, but one which was relinquished.

As early as the year 1839, it is admitted, that she had the notice which ought to make her more vigilant and active in the assertion of her claim; yet even then she remains silent, until 1846, during which time much of the estate is disposed of. See *5th Johnson's Chy. Cases*, p. 561, for the legal effect of this silence.

What is the effect of all this negligence on her part to make known the claim which it is now said she has upon this real estate, in the hands of *bona fide* purchasers, for a valuable consideration?

Let us first inquire what our own decisions say in answer to this inquiry.

In the case of *Steiger's Adm'r, vs. Hillen*, 5 G. & J., 121, this court said, "after the lapse of twenty-five years from the inception of title, a delay entirely unexplained, and without any

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claim whatever in the intermediate time being made, it would seem to be against public policy and convenience to allow the commencement of a controversy for rents and profits." This is quite as applicable to the case before us as to the case in which the remark is made. The widow has never insisted upon the payment of her annuity; she has remained silent, concealing her claim during a longer period of time.

It is said, however, that this case was overruled in the case of *Sellman vs. Bowen*, 8 Gill and Johnson. In that case it is said, "that in *Steiger and Hillen*, countenance is given to the doctrine that *at law*, a widow may recover from the alienee of her husband her damages;" and it was added, "that it is only in a court of equity that the rule will apply," nothing else that was said in the case of *Steiger and Hillen* is questioned.

Very recently too, in the case of *Kiddall vs. Trimble*, Ex'cr of Jacob, (decided December term, 1849, 8 Gill, 207,) this court, after quoting from *Steiger and Hillen*, what is above given, added, "it would be difficult to decree rents and profits in this case without seeming to question the correctness of that decision." This surely evidenced no disposition in the court then to deny the correctness of any thing in *Steiger and Hillen* touching the law of *this* case.

Such ought now to be considered settled law in *Maryland*. In *England*, excuse is often found for the delay of a widow to assert her rights, in the difficulty of ascertaining "the lands out of which she is dowable, and the persons against whom to bring her writ;" the title papers are not within her reach. In the case before us no such excuse can be offered. Yet in *England*, we find every where repeated with approbation, the remarks of Lord Camden, 3 Bro. Chy. Rep., 630. "Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there has always been a limitation to suits in this court. *Expedit reipublicæ ut sit finis litium*, is a maxim which has prevailed in this court at all times, without the help of an act of Parliament. Nothing can call forth this court into activity but conscience, good faith, and

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reasonable diligence. Where these are wanting, the court is passive and does nothing."

With the testimony to be found in the record, it can scarcely be believed, that if this bill had been such a bill as that in *West and Biscoe*, brought to recover these annuities, of *Edward and Fayette Gibson*, the claim could not be sustained.

The court would presume, that the annuity had been realized; the legal presumption would "hold the place of particular and individual belief." And surely, if the annuity could not be recovered from those who undertook to pay it, the security for that annuity, even if there be any such security, could no longer be regarded as answerable for it.

We forbear, (as the case does not require it,) to say whether, in our opinion, the land devised to these two sons was charged with the payment of this annuity. This is a question of intention, and cannot well serve as a precedent in any future case.

A receipt given by *Mrs. Gibson* to *Fayette Gibson*, bearing date, November 15th, 1841, for "\$5, in full of all money due from said *Gibson* to me, for rent or otherwise," has been introduced into the case by the appellees, and this, it seems to be thought, although it may reduce considerably the claim of the appellant, furnishes evidence, that the annuities which became due subsequently to its date, are not to be presumed to have been paid. This paper, *per se*, does seem to warrant such a conclusion; but then there is abundant testimony, that this receipt was executed, not to be evidence against the widow, but, as she herself stated at the time of its execution, "to avoid any difficulty between her children and grand-children after her death." The presumption too, furnished by the circumstances relied on, is not that either son paid the last year's annuity, but, perhaps, that the mother, who took so little in lieu of her dower, when, whatever she took was taken from her children, as soon as she discovered their embarrassments, was content to release what she had a right to claim of them, in consideration of the support which she afterwards received from them, if not for other considerations, of which it would be unreasonable to ask the appellees to furnish the evidence.

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We can discover no reason for reversing or modifying the decree of the chancellor, and approve of what he has said in regard to the staleness of this demand.

DECREE AFFIRMED WITH COSTS.

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The act of 1839, ch. 217, and its supplements, incorporating the "*Frederick Female Seminary*," do not constitute the "Board of Commissioners" therein named, a corporate body.

By this act of 1833, the board of trustees, which was to come into existence by the 5th and 6th sections of that act, is the body corporate thereby created, under the name and style of "*The Trustees of the Frederick Female Seminary*."

It was not necessary, that all the duties of the board of commissioners, should be performed, before the board of trustees could organise and open the school.

The duties to be performed by the board of commissioners, did not require a corporate existence, and for any omission of their duty, or wrongful and injurious acts, their bond given, as required by the 2nd sec. of the act of 1839, was answerable, and not the charter of the board of trustees.

The duration of the existence of the board of commissioners, in the absence of a period fixed by the act of Assembly, is determined by the duties, for the performance of which, it was created.

These two boards, of commissioners, and trustees, may exist at the same time, and a member of one, may at the same time be a member of the other.

Every allegation or matter affirmed in the preamble to an act or resolution of the legislature, is not to be considered as incontrovertible.

The board of commissioners were authorised to become a board of trustees, after the grounds were purchased, and the necessary buildings and improvements were erected thereon, and their doing this, and opening and organising a school, before the whole proceeds of the lottery grants had been received, and all the duties of the board of commissioners had been performed, was no violation of their charter,

It was their duty under the charter, to open the school as soon as they pos-

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sibly could, after the grounds were purchased and paid for, and the buildings ready to receive students.

The act of 1845, ch. 75, authorising the attorney general to institute proceedings against the board of commissioners for the *Frederick Female Seminary*, to inquire whether the charter and franchises of said board, ought not to be annulled by reason of abuser thereof, only authorised charges of abuse of franchise, and did not authorise any inquiry touching the breaches alleged in the *scire facias* in this case.

That act did not authorise any proceedings against the four additional commissioners, appointed by the act of 1844, ch. 27, a supplement to the act of 1837, ch. 217.

APPEAL from *Frederick* county court.

The legislature, in December, 1845, passed an act, (1845, ch. 75,) entitled: “An act to authorise and direct the attorney general, to institute proceedings against the board of commissioners for the *Frederick Female Seminary*.” The preamble states: “Whereas, it has been represented to the General Assembly of *Maryland*, on the memorial of *Alexander B. Hanson* and *Jacob Markell*, two of the commissioners of the *Frederick Female Seminary*, that the charter or franchise of said institution, hath been forfeited by certain acts of *Gideon Bantz*, *David Boyd* and *Christian Steiner*, three of the commissioners of said institution, which said acts and forfeiture, have been on the counter-memorial of said three commissioners, denied; and whereas, by mutual consent of the said parties, it hath been agreed that a *scire facias* be issued, to try the alleged forfeiture, therefore:”

Sec. 1. Authorises and directs the attorney general, “to institute proceedings against the board of commissioners for the *Frederick Female Seminary*, to ascertain whether the charter and corporate powers, and franchises of the said board of commissioners, ought, by reason of abuser of such powers or franchises, to be vacated and annulled.”

Sec. 2. Provides, that in case the acts of said board shall be judicially declared to amount to a forfeiture of the charter, such declaration shall not, in fact, work a forfeiture, but all the property, effects, endowments and grants, heretofore made by the legislature, shall vest in *Alexander B. Hanson*, *Jacob Markell*,

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Gideon Bantz, David Boyd, Christian Steiner, Richard Potts, Frederick A. Schley, Samuel Tyler and Lloyd Dorsey, and their successors, as commissioners and trustees of the *Fredrick Female Seminary*, in the same manner in which said property and franchises are now vested in the original commissioners, with the same powers, rights, duties and obligations conferred on said original commissioners. The 3d section provides for a disposition of the funds of the institution, pending the *scire facias*.

Thereupon, the attorney general of the State, on the 23d of October, 1846, sued out a writ of *scire facias* from *Frederick* county court, setting forth the original charter of the *Frederick Female Seminary*, and the several supplements thereto.

The act of 1839, ch. 217, (the original charter,) by its preamble, states, that “whereas, it is represented to this General Assembly, by many citizens of *Frederick* city and county, that a female seminary, for the education of girls in the higher departments of science and literature, is much wanted in *Fredrick* city; that individual contributions cannot be obtained, sufficient in amount to erect the necessary buildings, and purchase a suitable library and philosophical apparatus; and whereas, education in all its departments is a matter of public concern, and has received and ought to receive the patronage of the State, and should be promoted when the means of the State will justify; therefore:”

Sec. 1. Enacts, that *Alexander B. Hanson, William Tyler, Lawrence Brengle and David Boyd* of *Frederick* county, be “appointed commissioners,” with authority to raise the sum of \$20,000, clear of expenses, “by a scheme or schemes of lottery, and the sale or sales thereof, and the tickets therein.”

Sec. 2. Provides, that said scheme or schemes be approved by the lottery commissioners; and before the sale thereof, the said commissioners shall give bond with security, &c., to be approved by the lottery commissioners, conditioned for the faithful discharge of their duty, and for the due application of the moneys, coming to their hands; which bond may be sued on as other public bonds, by any person interested in the condition thereof.

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Sec. 3. Gives the power to said commissioners, to sell said scheme or schemes for such sums as they may deem proper; *provided*, the purchaser shall give bond for the punctual payment of all prizes that may be drawn to the tickets.

Sec. 4. “And be it enacted, that the commissioners by this act appointed, shall have full power and authority to purchase as much ground as may be necessary, in the city of *Frederick*, and to build thereon, all such houses, and make all such enclosures and other improvements as they, or a majority of them, may deem suitable for a female academy, and to have the title to the same conveyed to them, in trust, for the uses, trusts and purposes hereinafter mentioned, and to pay for the same, out of the money authorised to be raised by this act.”

Sec. 5. “And be it enacted, that the said commissioners, after they have so purchased and paid for said ground, and had the proper buildings and other improvements thereon erected, shall be, and are hereby constituted and appointed a board of trustees, under the name and style of the trustees of the *Frederick Female Seminary*, and as such, shall hold all the said property, as well as other property that may hereafter be conveyed to them, for the use of said seminary, in trust, for the uses, and under the regulations hereinafter provided and set forth.”

Sec. 6. Enacts, “that the said trustees and their successors, be and they are hereby declared to be a community, corporation and body politic forever, by the name and style of the *Frederick Female Seminary*,” and by that name, to have, receive and retain property, real and personal, also devises, bequests, donations, &c., and to transfer and dispose of the same, in such manner, for the benefit of the seminary, as they may think proper; *provided* said corporation shall not hold property at any time, exceeding the value of \$3000 *per annum*; and the said corporation, by the name and title aforesaid, “shall be forever *hereafter*, capable in law, to sue and be sued,” &c.

Sec. 7. Provides, that the corporation may have a common seal, &c., “and shall in general, have and exercise all such rights, privileges and immunities, as by law are incident to, or

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necessary for corporations of this character, and to enable the members of the same to exercise all things concerning the design thereof, which is hereby declared to be, the promotion and advancement of female education, and the cultivation and diffusion of literature and science.”

Sec. 8. Enacts, that on the death or resignation, &c., “of any one or more of said trustees, or their successors, it shall be the duty of the remaining trustees, or a majority of them, to appoint some suitable person or persons, to fill the vacancy or vacancies, as often as they shall occur.”

Sec. 9. Provides, that when the “said commissioners” shall, instead of selling a scheme, sell the tickets therein, they shall pay the prizes that may be drawn, and this obligation to be within the condition of their bond.

Sec. 10. Enacts, that if a vacancy shall occur “in the board of said commissioners, the same shall be filled by the governor of *Maryland*,” the persons appointed being required to give bond, as prescribed by the 2nd section of this act.

The act of 1841, ch. 256, was the first supplement to the above, and in its preamble states, that it was represented to the legislature “that *John Brunner of Jacob*, was intended to be appointed one of the commissioners under said act, so as to have five instead of four,” and that his name was omitted in the engrossed bill by mistake, that he had given bond with the other commissioners, and was now acting as such. *Therefore:*”

Sec. 1. Enacts, that said *John Brunner of Jacob* be appointed an additional commissioner, with the same rights and powers, as if his name had been inserted in the original act.

Sec. 2. Enacts, “that the said five commissioners shall be called and known by the name and style of the board of commissioners for the *Frederick Female Seminary*,” and by that name and style, shall hereafter make all contracts, and do all other acts that the four commissioners are authorised and empowered to do, under said original act.

Sec. 3. Provides, that said board of commissioners shall have power to appoint a secretary, whose duties, compensation, &c., are specially defined in this section.

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Sec. 4. Gives authority to the board of commissioners to mortgage or pledge the funds received under the original act, if they find it necessary, in order “to ensure the erection and completion of all the buildings proper for said seminary, and to furnish the same with a suitable library and philosophical apparatus.”

Sec. 5. Gives validity to the bond of *John Brunner of Jacob*, referred to in the preamble.

Sec. 6. Repeals so much of the 6th section of the original act as limits the amount of property to be held “by the trustees,” to \$3000 per annum.

Sec. 7. Enacts, “that the trustees” shall have full power to grant degrees, by diplomas to the pupils, and make such regulations in regard to granting and conferring degrees, as they may think proper.

Sec. 8. Makes the act go into operation immediately after its passage.

The act of 1843, ch. 48, is the second supplement to the original act, and in its preamble, it is stated, that “it is represented to the legislature, by the board of commissioners of the *Frederick Female Seminary*, and others, that the object intended to be effected by the original act, will fail, unless said board is allowed to raise a larger amount of funds, and the legislature being satisfied that said commissioners have thus far faithfully discharged their duties. Therefore:”

Sec. 1. Enacts, that the grant by the original act to raise the sum of \$20,000, be extended, so as to enable said board of commissioners to raise the sum of \$50,000; and for that purpose, the lottery commissioners are directed to raise the additional sum of \$30,000, in the same manner as they are now raising the sum authorised by the original act.

Sec. 2. Enacts, that the “lottery commissioners, as they shall from time to time raise said sum, shall pay the same over to the board of commissioners of the *Frederick Female Seminary* who shall apply not more than \$10,000 thereof, in the same manner and for the same purposes as are set forth and provided for in the original act.”

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Sec. 3. Enacts, “that said board of commissioners shall pay the remaining \$20,000 over to the trustees of the *Frederick Female Seminary*,” to be by them invested for the use and benefit of the said seminary “which is hereby declared as and by way of an endowment of said seminary,” and the “said trustees” shall from time to time apply the interest of such investment in such manner, for the benefit of said seminary, as they may think proper and best calculated to advance the interest of said seminary.

Sec. 4. Provides, that said trustees shall educate annually, after the seminary shall be in full operation, one poor orphan child from each county and city.

Sec. 5. Provides, that such parts of the constitution as are inconsistent with this act be repealed, *provided* this act be confirmed by the next General Assembly, as the constitution provides.

This act was confirmed and made a part of the constitution of the State, by the confirmatory act of 1844, chap. 7; and in the same year, the act of 1844, chap. 27, was passed as a further supplement to the original act. The preamble to this last supplement states, “that it is represented to the legislature, that the present number of commissioners appointed under said original act, ought to be increased from five to nine; *therefore*.”

Sec. 1. Enacts, “that *Richard Potts, Frederick A. Schley, Lloyd Dorsey* and *Samuel Tyler*,” be appointed commissioners with the present acting commissioners of the *Frederick Female Seminary*, with the same powers, and subject to the same liabilities, in connexion with the five acting commissioners, as if they had been appointed by the original act; and said board of commissioners shall consist of nine, instead of five members, their duties, powers and obligations to be the same as prescribed by the original act and its several supplements; *provided*, the four new commissioners appointed by this act, shall not be bound in their individual capacity, for any debts or contracts due by said acting commissioners for the purchase of the ground, erection of buildings, improvements there-

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on, &c., for which the present acting commissioners are individually bound or answerable.

Sec. 2. Makes the debts and responsibilities of the present board of commissioners, specific liens on the grounds purchased, and buildings erected, in favor of said commissioners, who are bound for said debts until they are paid and satisfied.

Sec. 3. Provides, that in case any commissioner appointed in pursuance of this act, shall refuse or neglect to execute his bond, or shall decline to serve on or before the 1st of April next ensuing the passage of this act, the governor shall proceed to fill such vacancy or vacancies, in the manner provided in the original act.

The writ then charges, that the four commissioners named in this last mentioned act, accepted the trust confided in them, and on the 12th of March, 1845, together with *Hanson* and *Markell*, two of the five commissioners, executed their bond to the State, as required by said act, whereby said four became constituent parts of said board of commissioners, and were clothed with all the powers of commissioners under said acts of Assembly, whereby the said board of commissioners, after said acceptance, consisted of nine, instead of five persons. That at the time when the five acting commissioners applied for the passage of the act granting them the additional sum of \$30,000, they had purchased the grounds, and erected thereon certain buildings, intended, when completed, for said seminary, but the same were then incomplete and unfinished, and constituted only a part of the buildings intended by them to be erected and necessary to be erected for the completion of said seminary, to pass the same into the hands of the trustees as such, that they might so put it into operation as to carry out the intent of the act of 1839, ch. 217, and its supplement, the act of 1841, ch. 256; and further, that said commissioners, as such, applied for said law, and induced the legislature to pass the same, to enable them to erect and complete all the buildings proper for said seminary, and to furnish the same with a suitable library and philosophical apparatus, for which purpose they might expend, if necessary, the sum of \$30,000, which

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buildings, so far as constructed, were then, and still are unpaid for by the funds that have come to the hands of the commissioners. That after the additional commissioners had accepted the trust, and given bond as required, the said *Bantz, Steiner* and *Boyd* refused to enter into said bond, and refused to act with the other commissioners, and held a meeting and excluded from their said board, the four additional commissioners, in order that they as a majority of said original board of five commissioners, might carry out the unlawful acts hereinafter set forth.

The writ then proceeds to allege *three* breaches of the franchise granted by these several acts of Assembly. The 1st breach alleges, that three of said board of commissioners, viz: *Bantz, Steiner* and *Boyd*, on the 28th of July, 1846, usurped and assumed upon themselves all the franchises, privileges and powers of the office of trustees, under said acts of Assembly, and opened, organized and carried on a female seminary in the buildings of the corporation, before said buildings were finished, and while the same were incomplete and unpaid for, and although other and further buildings and improvements ought to be erected to carry out the intent of the several acts of Assembly, and although but a small part of the said sum of \$50,000 had been received, or was receivable by said board of commissioners.

The 2nd breach charges, that said *three commissioners*, on the 8th of July, 1845, unlawfully organized, established and carried on a female seminary or school, in the buildings of the corporation, (which were at the time, unfinished, incomplete and unpaid for,) without having first received the full sum of \$50,000 under the lottery grants, and without having performed and fully executed all their duties as commissioners, which acts the said board of commissioners have suffered, and not taken any legal steps to prevent.

The 3d breach charges, that the said *board of commissioners*, on the 8th of July, 1845, unlawfully organized, opened and carried on a female seminary or school, in said buildings, (which were at the time, unfinished, incomplete and unpaid

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for,) without having first received the full sum of \$50,000 from the lottery grants, and without having performed and fully executed all their duties as commissioners aforesaid, and have thereby unlawfully usurped and taken on themselves the privileges and franchises vested by the several acts of Assembly in the body corporate, styled the "*Frederick Female Seminary*," whereby the said franchises have been defeated, and have become forfeited to the State.

The writ then commands the sheriff to give notice to the "board of commissioners for the *Frederick Female Seminary*," to appear and show cause why their said charter ought not to be vacated and annulled, and their grants, endowments and privileges declared to be vested as directed by the act of 1845, chap. 75.

To this writ the sheriff made return thus, "made known," and the record then states, that the "said board of commissioners for the *Frederick Female Seminary*," appeared by *Joseph M. Palmer*, their attorney, and filed a general demurrer to the writ, and the several breaches therein alleged, which the court sustained as to the *first* breach, and overruled as to the second and third. The "said board of commissioners" then, under leave to withdraw their demurrers to the second and third breach and answer anew, filed *four* pleas, the first of which, (being a plea to the second and third breaches,) avers, that the said *Bantz, Steiner and Boyd*, on the 8th of July, 1845, as a majority of the commissioners for the *Frederick Female Seminary*, under the act of 1839, chap. 217, and its supplements, did, after said board of commissioners had first purchased and paid for as much ground in the city of *Frederick* as was necessary to build thereon all such houses, and to make all such inclosures and other improvements as a majority of said commissioners deemed suitable for a female academy, and after having so purchased and paid for said ground, and had built therein all such houses and inclosures, and other improvements as a majority of said commissioners deemed suitable and necessary for a female academy, and after the title to said ground was conveyed to them in pursuance to said act of incorpora-

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tion, and not before, organize as a board of trustees of the *Frederick Female Seminary*, and as such trustees did organize, establish, and carry on in said buildings, a female seminary or school, under and by virtue of said acts of incorporation.

The second plea, (a plea to the whole writ,) avers, that the three persons named in the first plea, being a majority of the board of commissioners for the *Frederick Female Seminary*, did, on the 8th of July, 1845, by virtue of the act of 1839, chap. 217, and the supplements thereto, after they had organized and constituted themselves into a board of trustees of the "*Frederick Female Seminary*," by virtue of said act of 1839, organize, establish, open and carry on a female seminary or school, in said building, so built and erected as aforesaid. And the said board of commissioners further say, that before they organized themselves into a board of trustees, as much ground as was deemed necessary in the city of *Frederick*, was purchased and paid for, and all such suitable and proper houses, inclosures and other improvements, were built and erected thereon, as a majority of the commissioners under said act of incorporation, deemed suitable and proper for a female academy, as preliminary to the organizing, establishing and opening said female seminary or school, by said trustees as aforesaid. And said defendants further say, that said *Bantz*, *Steiner* and *Boyd*, after said ground, &c., was purchased and paid for, and suitable and proper houses, &c., erected, &c., thereon, under the acts of incorporation, and not before, did, in pursuance of said acts of incorporation, organize as a board, and take upon themselves the office, of trustees of the said corporation, and as such trustees, on, &c., did organize, &c., a female seminary or school, in said buildings, as they well could and might do, according to the true intent and meaning of the said act of incorporation, in the said writ of *scire facias* recited.

The third plea, (a plea to the second and third breaches,) sets forth the 5th section of the act of 1839, chap. 217, and avers, that defendants did, prior to the issuing of the writ of *scire facias* in this cause, and prior to the time of doing the

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grievances therein alleged, purchase, &c., a lot of ground, in the city of *Frederick*, and make such buildings, &c., as a majority of said commissioners deemed suitable for a female academy, and did on, &c., organize themselves as a board of trustees, by and under the name and style of the “*Frederick Female Seminary*,” and did then and there, as trustees, cause a school for females to be opened and carried on in the buildings erected for that purpose, by the commissioners as aforesaid, as by the act of Assembly in such case made and provided, they had a right, and were fully empowered to do.

The fourth plea, (being a plea to the third breach,) sets out the act of 1839, ch. 217, and avers that prior to the issuing the writ in this case, and the opening of the school, &c., and before they organised themselves into a board of trustees, they, as commissioners, purchased, &c., (as stated in the other pleas,) and that said commissioners, after they had so purchased, &c., and had title conveyed to them, &c., and not before, did organize as a board of trustees, and did take upon themselves the office of trustees of the *Frederick Female Seminary*; and after they had so organised, and not before, they, as such trustees, on, &c., proceeded to open, &c., a female school in the buildings erected for that purpose, as by the said act they had a right and were fully empowered to do.

The State filed general demurrers to all these pleas, and the counsel of the parties agreed that a *pro forma* judgment be rendered for the State on these demurrers. Whereupon the county court gave judgment that the liberties, privileges, franchises, property and endowments of the said board of commissioners for the *Frederick Female Seminary* should be seized into the hands of the State of *Maryland*, and the said board of commissioners be excluded and removed therefrom, and the same be vested as directed by the act of 1845, ch. 75. From this judgment, the record states the said board of commissioners for the *Frederick Female Seminary* appealed.

This appeal was taken, and the record transmitted to the December term, 1849, of this court, and a motion was then made by the State that the cause should be tried and determin-

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ed at that term, as a preferred case under the act of 1831, ch. 68; sec. 4. This motion was argued by *Wm. M. Merrick* and *F. A. Schley*, for the motion, and by *Jos. M. Palmer*, against it, and the court, (DORSEY, C. J., and MAGRUDER, MARTIN and FRICK, J.,) overruled the motion, and the cause was then continued until the present term, when it was argued before SPENCE, MAGRUDER and FRICK, J.

JOSEPH M. PALMER and WM. SCHLEY, for the appellants, made the following points:

1st. On the general demurrers of the State to the pleas of the defendants, the court will examine and consider the whole record, and mount up to the first defect in substance, and give judgment against the party whose pleadings are first defective.

2nd. The *scire facias* is radically and substantially defective, for that it is not shown and made to appear in the said writ, that the commissioners, &c., are a corporation and body politic by that name, but it clearly appears that the commissioners, &c., as such, were merely fiscal agents to perform certain preliminary acts and conditions, provided for in the charter, before they could assume the character of corporators, and exercise corporate powers and franchises, as trustees of “the *Frederick Female Seminary*.”

3rd. The commissioners, as such fiscal agents, were required by the charter, to give bond to the State of *Maryland*, with approved security, conditioned for the faithful discharge of the duties and trusts reposed in them as such commissioners, &c., and they are responsible for all misconduct or breach of trust, to any person or persons, or body politic, interested in the condition thereof, and they, as a board of commissioners, are not in any way responsible as corporators.

4th. A charter is a contract or a compact between the State granting it and the corporators, and no act or acts of the corporators can legally be construed to amount to a forfeiture of the powers and franchises to them granted, unless they be such acts as amount to a breach or violation of some express or implied stipulation or condition in the charter: no such acts are charged or alleged in this *scire facias*.

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5th. The board of commissioners, &c., as such, were merely fiscal agents or trustees to perform preliminary duties and conditions specified in the charter, before the corporation sprang into existence as a body politic and corporate, with the right to exercise corporate powers and franchises, and so soon as those preliminary duties and conditions were performed, the board of commissioners were, by virtue of the 4th and 5th sections of the charter, converted into a board of trustees of “the *Frederick Female Seminary*,” with the right and privilege of exercising corporate franchises; and as soon as they assumed the character of trustees, &c., and became a body politic, they ceased to be and exist as a board of commissioners, &c.

6th. So soon as the board of commissioners as fiscal agents ceased to exist as such, and they were organised into a board of trustees of the *Frederick Female Seminary*, all the rights, powers, privileges and duties of the *corporation* and body politic, both fiscal and educational, devolved on them as trustees of said seminary, and they then, and not before, became amenable to the law as such body politic, &c.

7th. The writ of *scire facias* in this State against a corporation and body politic, to obtain a judgment and vacate a charter, was authorised by the act of 1832, ch. 306, and before that act, no such writ could legally be issued and sustained in *Maryland*, as writs of *scire facias* issue out of a record, hence out of the court where a record is, and in this State, all corporation charters are created by acts of the legislature, and the acts of incorporation being recorded in the office of the clerk of the Court of Appeals of the Western Shore, and as that court has no original jurisdiction, it became necessary for the legislature to interpose and accommodate the writ of *scire facias* to the existing state of things, and that act only authorises a writ of *scire facias* to be issued against an actual legal existing corporation and body politic, capable of acting as such, who have abused their powers and franchises, and not against a corporation *de facto*.

8th. To authorise a proceeding in the name of the State, by the attorney general, to annul and vacate a charter or fran-

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chises, a public injury or wrong must be charged and alleged in the *scire facias*, and proved, and if the wrong complained of is a mere private injury, in which the public has no interest or concern, and for which a civil action can be sustained, the *scire facias* is bad on general demurrer.

9th. The board of commissioners for the *Frederick Female Seminary* as such, being merely fiscal agents or trustees, are not strictly an integral part of the corporation, and as commissioners, they are only liable and responsible for all their misdoings or breaches of trusts upon their official and individual bond given to the State, by virtue of the 2nd section of the charter aforesaid.

10th. The true and legal construction of the charter in this case, is for the court, and the true intentions of the legislature and the corporators must be complied with, regardless of the letter of the acts: words must be so construed as shall best answer the intention of the legislature, and when the true intention can be discovered, it must prevail and be regarded, &c.; and in case of doubtful construction of the charter, the court will mould it according to reason and convenience to effectuate the true intention of the legislature and corporators.

11th. The supposed difficulty, &c., springing out of the 8th and 10th sections of the charter, in relation to filling vacancies, &c., in the board of trustees and the board of commissioners, vanishes by adopting the principles and theories contained in the foregoing points, as the board of commissioners as such cease to exist, the moment they legally assume the character of trustees, &c.; hence, the necessity and the power of the governor to fill vacancies in the board of commissioners cease, because the board of commissioners cease to exist as such, &c.

12th. The only charges made in said writ of *scire facias*, against the commissioners as acts of abuser, &c., are, that they organised as a board of trustees of the *Frederick Female Seminary*, and kept and carried on a female school or seminary, before they had received from the lottery grants fifty thousand dollars, and while the buildings were unfinished and incomplete and unpaid for, and it is respectfully submitted

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whether such charges and acts are, according to the true construction of the charter, sufficient to work a forfeiture of the said charter and franchises under the pleadings in the case.

13th. The demurrers to the several pleas in bar filed in this case admit all the facts well pleaded, and it is expressly stated and set forth in said pleas, that all the preliminary stipulations and conditions contained in the 4th and 5th sections of said charter, necessary to be performed before the commissioners became a board of trustees, &c., by virtue of the provisions of the charter were fully and completely discharged and performed: the judgment of this court ought, therefore, to be for the appellants on the said demurrers.

14th. If there be nine corporators instead of five, as contended for by the appellees, a part of whom have been ousted and deprived of their rights and privileges by the others, the writ of *scire facias*, in the name of the State, &c., is not the legal appropriate remedy in the case, but the parties injured and aggrieved, should obtain a *mandamus*, to be issued for the purpose of trying the right and restoring them to their rights and privileges as corporators, it being the only legal and appropriate remedy in this State in such cases; as the writ of *quo warranto* has never been in use and practised under in *Maryland*.

15th. What acts of abuser or nonuser of corporators will be deemed and considered sufficient to work a forfeiture of a charter or corporate franchises must depend in a great measure upon the particular stipulations and conditions contained in the particular charter under consideration, and but little, if any aid can be derived from the examination of adjudged cases upon the subject, and every case must therefore depend for its determination upon its own particular circumstances, and the peculiar phraseology, conditions and requirements contained and embodied in the act of incorporation or charter.

16th. The facts stated and set forth in the pleas in bar of the defendants, are legally sufficient to defeat the said *scire facias*, and as all the facts set forth in the pleas are admitted by the demurrers of the State, the judgment of the county court is erroneous, and ought to be reversed.

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17th. It does not appear in the record that the board of commissioners for the *Frederick Female Seminary* were, at the time of issuing the *scire facias*, a legal existing body politic and corporate by the name of the commissioners for the *Frederick Female Seminary*, capable of acting as a body politic: hence, considering the pleadings in the case, the judgment is erroneous, and ought to be reversed.

18th. The judgment of the county court, made and entered up in this case, is manifestly erroneous, as not being warranted or authorised by the act of 1845, ch. 75, which authorised the issuing of this *scire facias*, as said act declares and provides that the judicial declaration, &c., of the court, shall not, in fact, work a forfeiture of the charter, franchises and endowments of said seminary—in other words, the judgment of the court shall not, in fact, be a judgment upon which any process can be issued, or any judicial action of the court taken to enforce it, &c. The court are called upon to deliver their opinion upon an abstract proposition, without being permitted to give a judgment in the case.

19th. The right to issue the *scire facias* in this case, and the court to act under it, is by virtue of the special delegated authority given by the act of 1845, ch. 75, and that authority, &c., according to the repeated adjudications in this State upon similar questions, must be construed strictly; hence, the judgment of the court, *if for the State*, will leave the charter and franchises, &c., to remain and continue precisely as they did at the time of issuing the *scire facias*.

SAMUEL TYLER and F. A. SCHLEY, for the State.

First. That the organizing and carrying on a school by the corporation in the buildings, *before all the funds* under the lottery grants were received, and before all the duties of commissioners under the charter were performed, was a violation of the charter, and such a violation as works a *forfeiture*.

This proposition, though applicable to both breaches, has more particular reference to the *third breach*. In discussing it, the appellee contended:

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1st. That corporate powers must be construed strictly, and must be exercised in *the manner* and *forms* of the charter.

2nd. That a corporation is created *upon trust*, and *all the terms* of its charter are *conditions* of the trust, and *if any one of them* be violated, it will work a forfeiture of the charter.

Second. Upon the second breach, the appellee contended:

That even admitting that the nine corporators who constitute the corporation, had a right to organise and carry on the school in the buildings, before all the funds under the lottery grants were received, and before all the duties of commissioners under the charter were performed; yet that *the three* had no such right, and that the exercise of such a power *by the three*, with *the permission of the nine*, was a violation of the charter, and such a violation as works a forfeiture.

The appellee also made the following objections to the pleas of the defendant, which they contended were defects in *substance*, and therefore reached by the general demurrers.

1st. The *first plea* does not aver the receipt of *the whole* fund, to wit: the \$50,000 *before* the seminary was put into operation as a seminary of learning, which was a *condition precedent*, and the performance of it ought therefore to have been averred.

2nd. This plea professes to answer *both* breaches assigned in the writ, when in fact it answers *only one*. It answers the *second*, but not the *third* breach. The *third* breach charges the acts of abuser as done by the *whole board*. To this charge the plea affords no answer.

The *second plea* is to the entire writ, and is obnoxious to the same objections as the first.

The *writ* alleges, that the board of commissioners consist of *nine* corporators. This is a *material* allegation, and the defendant has *not* traversed it, and therefore *admits it*.

The *third plea* is to both breaches, but it is only an answer to the charge against *the whole* board. It does not notice, or in any way answer the charge of *permitting a minority* to act. This being bad in part, it is bad altogether.

The *fourth plea* is to the *third breach only*, and raises the

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question, and none other, of the necessity of the commissioners receiving the whole fund of \$50,000, before the seminary could go into operation, according to the letter and intention of the charter. Now, even admitting this to be a good answer to the *third breach*, to which alone it is pleaded, yet not being an answer to the *whole writ*, but only to *one* of the breaches, it follows, that if the other breach be for the appellee, judgment must be for the State.

Third. The judgment below was properly a judgment of seizure and restitution.

MAGRUDER, J., delivered the opinion of this court.

It was made know to the General Assembly, at its December session 1839, that citizens of *Frederick* were attempting to establish a female seminary in that city, but that individual contributions were found to be insufficient for the purpose.

What the memorialists asked, it is not stated. What the General Assembly upon this representation being made to it thought proper to do for this Seminary, will be seen in the act passed during that session, entitled, “An act *to aid* in the establishment of a Female Seminary in the city of *Frederick*.”

This law names four persons, and invests them with authority to raise \$20,000 by a scheme or schemes of a lottery. These four persons are styled commissioners, and in some parts of the law, a board of commissioners. To them is given authority to sell the schemes or the tickets and apply the proceeds of sale towards defraying the expenses of the building, &c.

These commissioners are also the persons to purchase the ground for this institution, and to build such houses, make such inclosures or improvements as they or a majority of them shall deem necessary for a female academy, and the property was to be conveyed to them in trust, &c.

This seemed to be every thing the legislature offered to do for the seminary until the ground was purchased and paid for and the buildings or other improvements were erected. When all this was done, a body corporate was to be brought into ex-

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istence to be named. “The trustees of the *Frederick Female Seminary*,” to sue and to be sued by that name, to have its corporate seal, and to discharge the duties which this law required of them.

It is further provided, that those who are the commissioners at the time when the ground is purchased and paid for, and the buildings erected, shall be the board of trustees, with the power of filling, themselves, any vacancies that may occur. Vacancies in the board of commissioners are to be filled by the governor.

Now this board of trustees when it comes into being, is unquestionably a body corporate. But it is insisted that the same act of Assembly creates another body politic, to continue such until and only until, the board of trustees have legal existence. These two bodies politic, we are told, cannot exist at the same time, the existence of the one must terminate, when that of the other commences, and thus the conclusion is arrived at, that there could be no board of trustees to open the school, while any of the duties of the board of commissioners remained to be performed, such as occasionally paying over the proceeds of another lottery grant.

We do not think so. The General Assembly, no doubt might have created another, and more than one other, corporate body, and might have assigned to each of them some of the duties which it was thought proper to require of the board of trustees. It might have constituted a corporate body *in perpetuum*, with no power but to manage the finances of the institution and others for other purposes. The legislature might have incorporated those commissioners *eo nomine*, or by any other name, with such powers as it chose to confer upon that corporation, and then have made the same individuals a board of trustees, with corporate powers, and have brought them into existence at the same moment, and given to each *immortality*.

But it was deemed expedient not to have a corporate body, until there was a school to be opened, but to have commissioners, having it is thought no corporate name, or existence, to per-

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form all the duties which were imposed upon them for the present and for an indefinite time.

We are not able to discover when or how these commissioners were incorporated for fiscal purposes, and certainly cannot learn that an individual of one board who is a member of the one, may not at the same time be a member of the other, or that the two boards cannot be in existence at the same time, and for any period of time, if the legislature so willed it. To the faithful performance of any of the duties assigned to the commissioners a corporate existence was not at all necessary. All the duties required of them, might have been performed by a single individual, as well as by a corporate body, and if a bond is required, as one was of the board of commissioners, then for any omissions of duty or wrongful and injurious acts, the bond, and not the charter of a body, never perhaps to be brought into existence, would be answerable.

But if the view which we have taken of this whole subject be correct, it is quite immaterial, whether these commissioners be a corporation, or, it may be, what is called a *quasi* corporation. An act of incorporation would neither enlarge nor lessen their powers, and the period of their existence as commissioners, would in either event, be determined by the act of Assembly, if it had fixed any period; or as it has not, with the duties, for the performance of which, the board was created.

It is said, that be these commissioners incorporated or not, in fact, they must be regarded in this proceeding, as a body politic. It would seem, however, to be as necessary to let us have a sight of the charter, as it was in the case of *Agnew against The Bank of Gettysburg*, 2 H. & G., 478. Without inspecting it, how are we to determine, that the body corporate (if it be a body corporate,) has done in its corporate character, any thing which it ought not to have done. It is here assumed, that the various acts of Assembly, set forth in the *scire facias*, do not show to us the corporate duties, or even corporate existence of this board.

The defendants, we are told, have admitted, that they are a corporate body, by appearing and pleading. It is manifest,

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however, that the individuals could not deny that they constituted the board, which was summoned to appear, and answer to the charges made against that board.

But what were their powers, and duties, and responsibilities as a board of commissioners? Again, it would seem to be somewhat difficult to discover who are the defendants, how many, or how few of them there are. It is supposed that there were either five or nine, but the record does not tell us any thing at all satisfactory, in regard thereto. The *scire facias* directs the sheriff, to make known to “the said board of commissioners,” (without giving us the names or numbers of them,) to appear and show cause, why, &c. The sheriff’s return is, “made known.” Thereupon, the record proceeds: “And the said board of commissioners for the said *Frederick Seminary*, being, &c., forwarned, now here come by *Joseph M. Palmer*, their attorney.” Some persons then must be *Mr. Palmer*’s clients, and we necessarily suppose that he has more than one. But the sheriff alone can tell us to whom he gave the notice, and he tells us nothing more than that he gave the notice to those who, in his judgment, were “the commissioners.”

Here in court, one great matter in controversy seems to be, for how many people *Mr. Palmer* appears. For nine, says one of the parties litigant, while the other is equally positive that there are but five. If we turn to the acts of Assembly to instruct us, it would appear from them, that there were some ten or twelve of these commissioners. In answer, however, to this, as well as to some other statements we have heard about acts of Assembly, we may be told of the remarks of *Chancellor Hanson*, (4 *Har. and McHenry*, p. 10,) that “every allegation or matter, affirmed in a preamble to an act or resolution of the legislature, shall not be considered as incontrovertible. And that a man may conceal from the legislature facts, which if known to them, might have defeated his application.”

We cannot take it for granted, that all who possibly may claim to be, really are clients of *Mr. Palmer*. 1st. Because there were but five, who, according to the act of 1845, were

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parties, affirming and denying, and afterwards, consenting to a reference of the matters in issue, to the court; and 2ndly. Because of the four persons, about whom the controversy arises, two of them appeared as counsel against the defendants.

There is some other matter which we notice in this record, and which may have some connection with this controversy. This institution, it seems, was so fortunate, as to obtain a second lottery grant, which it is taken for granted, will be worth to it \$30,000. This, however, was not obtained from the legislature. It is a *constitutional* grant. The same amendment of the constitution, which grants this to this seminary, expressly directs, that the lottery commissioners, as they shall "from time to time" raise said sum, shall pay the same over to "the said board of commissioners for the *Frederick Female Seminary*." No one can question, that "the said board" consisted but of five individuals, and a board consisting of a greater number, it would seem, can have no title to the proceeds of this (the second) lottery grant, without another change of the constitution of the State.

In this change of the constitution, we are furnished with an answer to all that has been said, in order to satisfy us, that the two boards cannot have a contemporaneous existence. It is here required, that they shall have existence at the same time; the board of trustees to receive and apply as directed, the \$20,000, all of which is to be paid to it by the commissioners.

It is made a question, what is correctly pleaded in this case? We have come to the conclusion, that the defendants have a right to insist, (the demurrer being a general demurrer,) not that the whole matter, suggested in the breaches is untrue, but that notwithstanding some of the suggestions, there is no ground for this proceeding, or for the complaint against the board of commissioners, that the school was opened, as the latter was the act of the board of trustees, determined upon and carried into execution by the trustees, after the property had been purchased and paid for, and the buildings erected. These facts, (the purchase and payment of the money, and erection of the buildings,) it is thought the demurrer admits; and then

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arises the question, whether the board of trustees could come into being, and act in that character, before the money to arise from the lottery grant was, (as it has not been,) received? This whole sum, it is said, must be raised and paid over to the trustees, before they can consistently with the charter, open the school, or have existence as a board of trustees.

A conclusive answer, it is believed, will be found to this, in the 5th section of the act of 1839, which tells us when the board of commissioners shall become a board of trustees, and in this respect, certainly, the charter has never been changed.

If, when they had the power to open the school, there were females ready to enter it, and proper persons could be had to take charge of it, why should its doors be closed any longer? Their charter nowhere requires it.

Would an excuse for this *non user* be found in the inability of the lottery grant, to yield all it promised? It might have been of advantage to the institution to have this fund; for the want of it the trustees might not have been enabled to employ teachers, and therefore could not have opened the school. But we are here to assume, that able professors could be had, and that there were scholars ready to enter the school; and the question is put to us, whence the authority of the trustees to open the school, until the \$20,000 were paid over to them? Their authority is to be found in their charter and office, which made it their duty to open the school as soon as they possibly could, after the building was ready to receive students, and the lot paid for. Could the mere grant of a lottery scheme have the effect to delay opening the school? We are required here to believe, that although the buildings were all of them in a state of preparation, the library procured, the philosophical apparatus purchased, the ablest professors ready to enter upon their duties, students demanding admittance, and although too this institution was enriched by the contributions of individuals, yet the buildings must be unoccupied, the professors remain unemployed, the children uneducated, and all the wealth of the institution of no value to it until a lottery grant could be made to yield \$30,000. Surely laws are not to be so interpreted.

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But the demurrer brings to our notice the objections to the *scire facias*, and perhaps it is needless to look at anything but this writ, and the act of Assembly, which authorized the issuing of it. This act of Assembly is a *charter* granted to the attorney general, and the inquiry now is whether in issuing this writ he was not guilty of an abuser or usurpation?

Why is he required by the act of 1845 to institute proceedings against the board of commissioners? Because two of the commissioners (their names given) had represented to the General Assembly that the charter or franchises of the said institution had been forfeited by certain acts of three of the commissioners, (their names also given,) which acts have been denied by those three commissioners, “and by mutual consent of the said parties, it has been agreed that a *scire facias* be issued to try the alleged forfeiture.” The inquiry to be made is, whether the charter or corporate powers and franchises of said board of commissioners ought, “by reason of abuses of such powers and franchises, to be vacated or annulled.” If the acts of said commissioners, or a majority of them shall be judicially declared to amount to a forfeiture of their charter and franchises, all the property, effects and endowments, and all grants heretofore made by the General Assembly, shall vest in *A. B. Hanson*, and the eight others “as commissioners and trustees of the *Frederick Female Seminary*, in the manner in which the said property and franchises are now vested in the original commissioners and trustees by the act of 1839, and the several supplements thereto, who shall be incorporated by said name, and shall be vested with the same powers, rights, duties and obligations conferred upon the said original commissioners and trustees by the last said act.”

In the remarks which have already been made, will be found reasons for the opinion of the court, that the act of Assembly does not authorise this proceeding. It is true, as we have been frequently reminded in the course of this argument, that corporations are mere creatures of the law, and must not violate the conditions upon which they are incorporated. But still legal causes must be stated, and the proceeding must be

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warranted by the law which directs it. For every imaginable breach the law does not design that the charter of a corporation must be revoked. *Stephens*, in his *Commentaries on the laws of England*, tells us, that “the exertion of this act of law for the purpose of the State, in the reigns of *King Charles* and *King James the Second*, particularly by revoking the charter of the city of *London*, gave great and just offence, though perhaps in strictness of law, the proceedings in most of the cases that occurred were sufficiently regular” and (by way of warning us of the consequence, but too frequently, of a wanton or even unnecessary exercise of power,) he adds, “but the judgment against the charter of *London* was reversed by act of Parliament after the revolution; and by the same statute it is enacted, that the franchises of the city of *London* shall never more be forfeited for any cause whatever.” Hence it is that the sovereign authority reserves to itself the right to determine, not only when such proceedings shall be instituted, but also when violations of a charter shall be overlooked.

It is the opinion of the court, that the act of 1845, ch. 75, did not authorize any proceeding against the person spoken of as additional commissioners.

It is also the opinion of the court, that the act just mentioned only authorized charges of abuse of franchises, and did not authorize any inquiries touching the breaches before us.

The court is not authorized by any thing to be found in this record to say that the board of trustees was not in being, and acting in that character in appointing the professor and opening the school. The court can discover in the record, nothing which would warrant it in deciding, that the board in opening the school, was not acting up to the end and design for which it was instituted.

JUDGMENT REVERSED,

NO PROCEDENDO.

Steven's Exe'rs, vs. Gordy.—1850.

WM. W. STEVENS AND DAVID STEVENS, EXC'RS OF LEVI STEVENS, vs. JULIANNA GORDY.—*December 1850.*

A testator devised to his daughter \$200 and a negro woman after the death of his wife. The executors sold the negro and received the proceeds. The daughter, the legatee in remainder, during the life of the widow, the tenant for life, filed her bill in equity against the executors, asking that the proceeds of the negro be brought in and invested for the use of the tenant for life, and after her death, for the use of the complainant. The tenant for life was made a defendant, and the chancellor decreed that the proceeds of sale be brought into court, to be invested according to the prayer of the bill, with the interest that may have accrued thereon. **Held:** That this decree was erroneous; the tenant for life cannot, in *this suit*, recover interest on the proceeds of sale.

The rights of the widow may not be protected by the decree: if she received the legacy, she would have no right to her thirds of the personal estate.

If the tenant for life were dead, and the executors were the persons to deliver the negro to the tenant in remainder, the latter could not in chancery claim the negro without at the same time claiming the \$200.

Upon a bill by a legatee against executors for a legacy, it must be shown, either by proof or the admission of the executors, that there is a sufficiency of assets after payment of debts, &c., and this allegation need not in equity be denied.

Distribution accounts filed with answers of the executors, showing a sufficiency of assets, but not introduced into the case as testimony, are not evidence in the cause.

The court of chancery has no power during the life of the tenant for life, to order the proceeds of sale of the negro to be invested for the benefit of the legatee in remainder. While the tenant for life is living, she is the person to claim the negro.

A legatee in remainder may claim an inventory, if one is needed, but cannot call for security.

APPEAL from the *Court of Chancery*.

The bill in this case was filed on the equity side of *Somerset* county court, by the appellee, (formerly *Julianna Stevens*,) and exhibits the will of *Levi Stevens*, the father of the complainant, which contains the following clause: "I give and bequeath to my daughter *Julianna Stevens*, two hundred dollars, to be paid to her out of my personal property, also my negro woman *Rose*, from and after the death of my wife, to her and her heirs and assigns forever."

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alleges that the testator died in December, 1834, and that the executory were granted to the appellants the executorship, they having given bond as such executors; and afterwards intermarried with *Wm. Q. Gordy*, who was divorced *a vinculo*, by the act of 1837, the executors, in March 1838, sold said negro for \$650, and that she was transported beyond the limits of the State.

The bill suggests that complainant's right to the estate was not to take effect after the death of her mother, but that the widow of the testator, and further suggests that as will, in a short time, bar her action on the prayer of the bill is, that said sum of \$650 may be for her benefit, and for the benefit of said *Mary* investment in some safe and productive fund. In her answer, the widow, is made a defendant, the complainant in the bill that she is a material party, and that the court has authority to make her a complainant.

The defendant, in her answer, admits most of the allegations. In relation to the sale of the negro, she says, it was made by *William W. Stevens*, one of the executors, and that the money was received by him.

The executors in their answers, deny that they sold the negro for a foreign market, as charged in the bill. They state that in May, 1836, they settled a final account as executors, and made a copy thereof marked No. 1, and further state that a distribution was made on the basis of said final account, and a copy of said distribution marked No. 2. They state that they paid to the widow a large part of her distributive share, and gave their obligations for the balance, and she gave them a receipt to them for her said share, and that the legacies are awarded to her in said distribution. They state that in November 1836, the negro was in the possession of the widow, *Mary Stevens*, and was taken from her by the then husband of complainant, and that before he got hold of said slave, they sold her on the 26th of May, 1836, for \$650, and they admit that she was transported beyond the limits of the State. They charge that *Gordy*

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is living, and they submit whether he is not a necessary party. They also submit whether the complainant can maintain this suit during the life of *Mary Stevens* the tenant for life of the negro. They further submit as a question of law, the matters relating to the statute of limitations, and also whether the case is not properly triable at law.

The distribution account No. 2, charges the executors with a balance due the estate by their final account No. 1, of \$1960.23, and then among other distributions the sum of \$400 was awarded to complainant, to wit: “\$200 for her legacy of that amount, and \$200 for negro *Rose*, appraised at \$200 from and after the death of the mother.”

The parties then agreed that the cause be referred to the auditor, to state an account according to his own views, and also according to the instructions of the respective solicitors, and that he should take and return testimony for the parties on ten days' notice. A replication was then filed to the answers, and at this stage of the proceedings the cause was removed to chancery on the suggestion of the complainant. No testimony was taken on either side, and no report was ever made by the auditor.

At September term 1848, the cause was submitted during the sittings, on the part of the complainant, and the chancellor (JOHNSON) expressing the opinion that the \$650 should be invested as prayed in the bill for the use of *Mary Stevens* for life, and after her death, for the use of the complainant, by a decree of the 8th of November 1848, ordered, that the defendants should bring said sum into court for such purpose, and the interest which may have accrued on the same. The complainant then applied for a *fi. fa.* on this decree, and in their petition ask that interest may be computed from the 26th of November 1848, the day of the sale of the negro, and the chancellor directed the writ to issue, and interest to be computed from said date. The executors then appealed from the decree.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

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WM. W. HANDY, for the appellee, contended, for an affirmation.

1st. That it does not appear from the record, that the slave *Rose* was ever delivered or paid over to *Mary Stevens*; it is not so averred in the answer of the executors, but if it was, it would be an affirmative averment, put in issue by the replication, and unsupported by proof—and that consequently there is nothing in the 3rd point of the appellant's solicitor.

2nd. That the decree was properly passed; that although it is true, the complainant has no claim whatever to the arrears of interest on the \$650, the amount of the sale of negro *Rose*, as received by the executors, yet, the arrears of interest are clearly due to *Mary Stevens*, one of the defendants; that said *Mary* had answered the complainant's bill, and has prayed the court to protect her rights. That the matters set up by the executors in *avoidance*, are put in *issue* by the replication, and are not supported by proof. That the executors having, as appears by their answer, on the 26th of November 1836, sold the negro woman *Rose*, for \$650, and received the money, are to be regarded as trustees, and are liable to account in a court of equity; that from any thing appearing in the record, it is a continuing trust;—that even though the executors were liable in tort, it is competent for the complainant to waive it, and hold them responsible as trustees: and so likewise may *Mary Stevens*.

3rd. That the averments of the bill are sufficient—that there was no necessity for proof, inasmuch as the answers admit all the material allegations, and that if from the bill and answer, the equity clearly appears, no objection can be taken in the Court of Appeals to the sufficiency of the averments in the bill, since the act of 1832, chap. 302, sec. 5,—there not having been any exceptions filed to the sufficiency of the averments of the bill.

4th. That the complainant, although she has no *present* right to the slave *Rose*, or to her value, (her mother, *Mary Stevens*, being yet alive,) still nevertheless, is entitled to have the fund secured to her.

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It is true, that a court of chancery sometimes exercises jurisdiction, in order to prevent a multiplicity of suits. But that does not give one person a right to sue for what is supposed to be due to another. It might have authorized the complainant to sue for other claims which she has and which we do not learn from the record have been satisfied. If her mother was dead, and the executors were the persons to deliver the negro to her, she could not claim her in chancery without at the same time demanding the \$200, or admitting that it was paid.

But how are we to ascertain from this record, that the complainant is entitled to any part of the legacy? It must first be shown, either by proof, or the admission of the executors, that there are assets sufficient, after payment of debts, funeral charges, &c. This is nowhere charged, admitted or proved, and in chancery, (though at law it is otherwise,) it need not be denied.

Statements to be found in the record, might have thrown some light upon the subject, but these are not evidence, or, indeed, introduced into the case as testimony.

We cannot then affirm the decree. We were anxious to remand the case to chancery to amend the proceedings, if we could have found any thing in the record to justify that course.

Even if the money is to be paid when the legacy for life is determined, there must be deducted from it the executor's commissions, and what it is supposed she has already received as an equivalent for her interest in the negro.

But what right can the appellee have to ask the chancellor to pass any such order as he is asked to make in regard to this negro? While her mother is alive, she is the person to claim the negro. Formerly, indeed, some power like that now claimed was supposed to be possessed by the court of chancery, but it has long since been settled to be otherwise. See *5th John's Chy. Reports*, 349. A legatee might, indeed, claim an inventory, if one was needed, but cannot call for security. 1 *Brown's Chy. Rep.*, 279.

The bill and proceedings in the case before us, do not authorize the chancellor to give relief, and we cannot conjecture,

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that by any amendment of it, the complainant could make a case which would entitle her to the relief which she seeks.

JUGDMENT REVERSED, AND

BILL DISMISSED WITH COSTS.

JOHN PERRIN vs. THOMAS KEITHLEY AND OTHERS.—*December 1850.*

A decree was passed in September 1828, for the sale of a deceased's real estate to pay his debts, and appointing a trustee to make the sale, who filed his bond, which was approved, but made no report of sales, and nothing further was ever done by him in chancery. In October, 1847, three of the children of the deceased, filed their petition in the case, charging that the trustee had sold the property and received the money, but had never paid over the balance to which they and others were entitled, and praying the appointment of a new trustee to collect and distribute the proceeds of sale. The former trustee being dead, a new trustee was appointed, who gave bond and was proceeding to re-sell the real estate of the deceased, when the purchasers under the original trustee filed their petition averring that they became purchasers of the land from said trustees at public sale, on the 2nd of May, 1829, for a full and fair consideration, which they had paid to the trustees, and had ever since been in possession of the said property, and had made improvements thereon. Upon proof establishing the allegations of this petition, it was HELD, that under these circumstances, the sale by the original trustee ought to be affirmed.

APPEAL from the Court of Chancery.

This case originated in a creditor's bill filed in the court of chancery, on the 9th of December, 1826, by *Samuel Harrison*, a judgment creditor of *John Merchant*, deceased, against *A. B. Harrison*, the administrator, and *John Perrin* and others, the heirs at law of said *John Merchant*, for a sale of his real estate to pay his debts.

A decree was accordingly passed at September term, 1828,

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and *A. B. Harrison* was appointed trustee to make the sale, who, on the 19th of November following, filed a bond, which was duly approved. The evidence taken in the case previous to this decree, established the fact of the insufficiency of the personal estate of the deceased. The only claim proved against his real estate, was that of the complainant, *Samuel Harrison*, founded on a judgment for \$261.

No further proceedings were taken in the case until the 22nd of October, 1847, when *Eliza, Susan* and *Joseph Merchant*, three of the children of the deceased, filed their petition, in which, after setting out the previous proceedings, they stated that the trustee, *A. B. Harrison*, made sale of said real estate about the year 1828, for about \$5000, although his sales were never reported to the court; that although he had received all the purchase money, he had never paid over the balance to the persons entitled, of whom the petitioners were three. They further alleged the death of the trustee subsequent to said sales, and receipt of the purchase money, and prayed for the appointment of a new trustee to *collect and distribute* the proceeds of sale.

Upon this petition, an order was passed on the 22nd of October, 1847, appointing *John Glenn* trustee in place of said *Harrison*, and this order further states, that "it being represented to the court that the former trustee had made sale of the trust property, and it appearing by the proceedings in the cause that said former trustee had made no return of his proceedings to this court, it is further adjudged," &c., that the trustee hereby appointed, "proceed to collect the money for which the trust property was sold by the former trustee, provided upon investigation such should turn out to be the case," and to bring the said fund into court, and "shall have power and authority to adopt such other means as may be necessary and proper to bring the trust so reposed in him to a close." *Glenn* declining to act, *John Perrin*, the appellant, was appointed in his place, accepted the trust, and filed his bond on the 26th of May, 1848.

On the 24th of June, 1848, *Thomas Keithley, William*

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Skinner, Edward Sears, John R. Caulk, Samuel Blades, and Elizabeth, his wife, filed their petition, stating the appointment of *A. B. Harrison* as trustee, and that on the 2nd of May, 1829, he proceeded to sell the real estate of *John Merchant*, and sold one lot in the town of *St. Michaels*, in *Talbot* county, to *Thomas Graham*, from whom it was afterwards bought by the trustee, and sold to said *Keithley*; another lot in said town to the complainant, *Samuel Harrison*, whose executors afterwards sold the same to *John B. Jefferson*, who has since sold one-half to *William Skinner*, and the other half to *Edward Sears*; another lot of land in *Talbot* county, called *Fairplay*, to the complainant, *Harrison*, who has since sold it to *William Hambleton*, who sold to *John R. Caulk*; and also a house and lot in said town to *Levi Blades*, which has since come into the possession of *Samuel* and *Elizabeth Blades*, and to which the heirs at law of *Edward Blades*, one of the children of *Levi Blades*, were entitled. That the whole amount of sales was only \$265, the first lot having sold for \$16.50, the second for \$87, the third for \$131.50, and the fourth for \$30. The petitioners alleged the full payment of all the purchase money to the trustee, and that the property sold for its full value at the time of the sale, and that the purchasers and those claiming under them, had so improved it as to increase its value to ten times what it was when sold. They further alleged, that the new trustee had advertised the property again for sale, to their great damage, as they had not yet obtained a complete title from the court, and prayed that he might be restrained from so doing, that they might be permitted to take testimony to establish their title, and that on this being done, the trustee might be required to execute to them sufficient deeds for the property purchased by them.

The chancellor then, on the 14th of June 1848, passed an order upon the petition, requiring the trustee to desist from selling, with leave to the parties to take testimony on the usual notice. The trustee in his answer to this petition, states that he had married the eldest daughter of *John Merchant*. He denies knowledge of the lease pretended to have been made by the

former trustee. If such were made, he avers his belief that they were made at gross undervalues, and by collusion between the trustees and *Samuel Harrison*. He denies that any report was ever made of such pretended sales, and does not believe that the pretended purchase money was ever made. Testimony was then taken and returned.

The following facts were, in the opinion of the chancellor, conclusively established on the part of the petitioners. *First*. That a sale was made by the trustee on the 2nd of May, 1829, to the parties mentioned in the petition, and that the prices given by the purchasers for the several parcels of property, were at the time, fair and reasonable. *Second*. That the sale was a public one, in the presence of a considerable number of persons, and that there was competition among the bidders. *Third*. That the purchase money has been paid to, or settled, with the trustee, and that the purchasers and those claiming under them, have been for a long time in the possession of the property, and have made improvements thereon to some extent.

The objections to the ratification of the sale, were: 1st. That the sale was not made at the time and place mentioned in the printed advertisement filed among the proceedings. The time as advertised, was the 21st of April, 1829, and the place at the court house door in *Easton*, whereas the sales actually made, were made on the 2nd of May following, and the place, *St. Michaels*. 2nd. That the trustee did not make a report of his sales as directed by the decree. 3rd. The statute of frauds was urged not by way of plea or exception to the sale, made in writing, but *ore tenus*, and by way of argument.

The chancellor, (JOHNSON,) on the 19th of February, 1849, passed an order finally ratifying the sales made by the original trustee, and requiring the present trustee to desist from re-selling the property. The chancellor's opinion accompanying this order, is reported in *1st Md. Ch. Decisions*, 331. From this order, *John Perrin* appealed.

The cause was argued before SPENCE, MAGRUDER and FRICK, J.

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J. SHAFF STOCKETT and ALEXANDER, for the appellants, contended for a reversal of the chancellor's order for the following reasons:

1st. That upon the whole testimony legally admissible, it is not shown that the former trustee did sell the property, as alleged.

2nd. That the proceedings of the trustee, in relation to said pretended sales, were fraudulent and collusive.

3rd. That the petitioners are not entitled to the protection of purchasers for fair consideration and without notice.

4th. It is insisted on the contrary, that they knew, or had sufficient notice of the defects in their title.

5th. That no presumption can fairly be made in their favor.

DANIEL M. THOMAS and McLEAN, for the appellees, insisted for an affirmance on the following points:

1st. The order of 22nd October 1847, does not authorise the new trustee to sell, but only to collect and distribute the funds received by *A. B. Harrison*; and the petitioners admitted that a sale had been made, and the purchase money paid.

2nd. If the sales be fair, whether the purchase money was paid or not, the heirs of *Merchant* have no interest to entitle them to proceed against the property, because the debt of the complainant absorbed the whole.

3rd. The purchasers from complainant are certainly to be protected, because the debt due to him was not satisfied by his purchases, and he must be considered as having *paid* to the extent thereof.

4th. The payment of the residue is to be presumed, as the complainant has taken no steps to obtain it since the trustee's death.

5th. If the sales were fair, and the circumstances show a payment, or a presumption of payment, the court will not disturb the purchasers or their grantees, who have held the property so long, and made improvements thereon. Particularly at the instance of parties who have no interest in the question of payment.

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6th. The trustee was the agent of the court, and his acts may be ratified by it however irregular his proceedings were, provided no harm appears to have been done to any one; and particularly, as it appears that notice was once given in conformity to the decree.

7th. The proper remedy of the heirs, if they have been injured, was against the trustee, in the first place, and having been deprived of that by their own *laches*, they cannot now proceed against the terre-tenants.

8th. The statute of frauds would not apply to this case, even though it had been properly pleaded, which it has not.

MAGRUDER, J., delivered the opinion of this court.

At September term, 1828, a decree was passed by the chancellor, to sell the real estate of *John Merchant*, deceased, in order to pay his debts; the personal estate proving insufficient. *A. B. Harrison* was appointed the trustee to make the sale, and on the 29th of November in that year, filed his bond, which it appears was approved by the chancellor. Nothing further was ever done by the trustee in the court of chancery.

On the 22nd October, 1847, three of the children of the deceased filed their petition in the chancery court, in which it is charged, that the trustee made sale of the real estate of the deceased, about the year 1828, for about \$5,000, but the sale never was reported by him to the court; that he had received the purchase money, but had never paid over the balance, to which the petitioners and others were entitled. The petitioners ask the appointment of a new trustee, (the former trustee being dead,) to collect and distribute the proceeds of sale. *John Perrin* was appointed the trustee, gave bond, and in 1848, advertised the real estate for sale. In consequence of this advertisement, *Keithley* and others, claiming the land by purchase, filed their petition asking, for the reasons therein stated, that the new trustee should be restrained from making the sale. These last petitioners allege the sale to have been made in May, 1829; mention to whom the land was sold, first by the trustee, and afterwards by persons who claimed under

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the trustee. In this petition we are told at what price each parcel was sold; that the property sold for its full value at the time of the sale, though it has been since improved and made of much more value. The purchase money, it is alleged, is paid.

The further object of this last petition, is to establish their title by testimony and to obtain a deed.

Upon this petition being filed, the chancellor passed an order to require the trustee to desist from selling, and authorising testimony to be taken. Much testimony was taken, and on the 29th of February, 1849, the chancellor ratified the sales, and from this order of ratification the appeal is taken, and is now before us.

It must be admitted, that for the conduct of the original trustee no apology is to be made. At the same time it must be said, that none of the other parties connected with the case are faultless. The purchasers ought to have taken care that the sales were reported and ratified. This was equally the duty of the heirs, unless, as the record authorises us to believe, they were satisfied that there would remain, after satisfying the claims of creditors, nothing to be distributed among them. If the purchasers themselves were in court asking to be released from their purchases, there might be found reasons for granting such relief. But neither creditors nor purchasers complain. It is in proof too, that although there was at least one other creditor, yet no creditor has ever appeared in this court, except the one who filed the bill of complaint, who was a judgment creditor, and whose claim exceeded the amount of the purchase money, according to the testimony before us.

It is with reluctance that we give a judgment which may seem to sanction such conduct in a trustee of the court of chancery, and yet it would seem, that under all the circumstances of this case, and when the whole of the purchase money it may be presumed, has been collected and paid over to the judgment creditor, that the sale, upon this proof, ought to be ratified, since the purchasers require it.

Several of the heirs, some time ago, filed a petition, com-

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plaining of the conduct of the trustee, but it is charged by them, that he had made the sale, and received the purchase money. Only the husband of one of them appeals from the order of the chancellor ratifying the sale. He, too, is the person who, upon the petition of the heirs before spoken of, was appointed a trustee of the court to complete the trust. He was aware, that the object of the petition was to get a trustee to collect the purchase money and distribute it. Although authorized by the decree to proceed to sell the premises if a sale had not taken place, yet it was his duty to proceed to collect the money for which the property was sold, provided, upon investigation, such should turn out to be the case, yet his first act is, to advertize that the property is to be sold, and when enjoined by an order of the chancery court, not to sell, he appears in that court, and admits that he does not know whether all or any of the sales were or were not made by the trustee.

As those who purchased the property or derive title from the purchasers, wish the sales to be ratified; as we have no proof that the property did not sell for as much as it was then worth, and as purchasers and those claiming under them, it is to be presumed have now been in possession of the premises twenty years, claiming the same under a decree of the court of chancery, and a sale made by its trustee, it is not thought right to reverse the chancellor's order of ratification.

Objections to a sale, if made by one party, are often entitled to no consideration, yet when they come from another, might require a sale to be set aside. Some of the objections urged in this case, are such as the heirs of the person whose real estate is sold, have no right to insist upon. The chancellor's order appealed from is affirmed with costs.

ORDER AFFIRMED.

Beard's Exc'x, vs. Hubble, et al.—1850.

MARY ANN BEARD, EXC'X OF WM. BEARD vs. EDWARD
HUBBLE AND OTHERS.—*December 1850.*

A party who seeks relief in equity upon the ground of mistake, must produce proof clear and overwhelming of the existence of such mistake.

In all cases of mistake it is required that the party injured by the mistake, should take steps promptly to get relief, and if he is guilty of *laches*, he cannot complain if by reason thereof, he is a sufferer.

The complainant gave his note on the 16th of March 1840, to the testator of one of the defendants, and on the 10th of August of the same year confessed judgment thereon, which in 1845 was entered satisfied, and on the same day a new judgment was confessed for the amount of the old one, with interest then due thereon. In 1846 this judgment was assigned and entered for the use of the assignee. In 1847 the complainant, the judgment debtor, made a considerable payment to the administrator of the assignee, who afterwards assigned it to the defendant. The complainant then filed his bill in equity, asking relief on the ground that the note and original judgment were founded in mistake. The proof of mistake was not clear and satisfactory, and it was HELD: that the complainant was not entitled to relief, and that the assignees of the judgment have a superior equity to any that the complainant has been able to show.

APPEAL from the equity side of *Washington county* court.

The bill in this case was originally filed by the testator of the appellant against the appellees. The allegations of the bill and answers, and all the facts of the case, are very fully stated in the following opinion of the court below, delivered by his honor, judge MARSHALL.

“The object of the bill filed in this cause, is to obtain a perpetual injunction upon a judgment against the complainant, in favor of a certain *Jacob Brewer of J.*, now deceased, for \$2179.19, with interest from the 25th of August, 1845. The judgment was signed in *Washington county* court, on the 8th of September 1845. The bill charges that the note upon which the judgment was rendered, and the judgment itself was founded in mistake. That at the time the note was given, and at the time the judgment was rendered, the complainant in fact owed the said *Jacob Brewer* nothing. The answer of each and all the defendants, deny all knowledge of any mistake in the said note or judgment and *John A. K. Brew-*

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er, the administrator of *Jacob Brewer of J.*, expresses his belief that there was no mistake in the said note or judgment. The complainant, upon the answers of the defendants, is left to make out his case by such proof as he can produce for the consideration of the court.

In the argument of this cause no question was raised as to the jurisdiction of this court, founded in mistake, when the mistake is charged in the bill, and if raised would not at this day deserve a moment's consideration. Neither was it denied that in equity, upon a charge of mistake in a written contract, deed, bond, note, judgment, &c., that parol evidence was admissible to reform or correct the mistake. But while these plain propositions were fully admitted, it was urged with great propriety, that all cases in which a court of equity admits parol evidence to vary and reform written contracts or instruments, upon a charge of fraud, accident or mistake, are exceptions to the general rule which excludes parol evidence for such a purpose, and that therefore, when relief is sought upon the *strength of parol proof*, the mistake charged in the bill must be a *plain mistake clearly made out, entirely* to the satisfaction of the court.

The question for consideration at this stage of the inquiry is, what amount of proof will authorise a court of equity to administer relief, where the complainant in his bill seeks to correct or reform a written contract, note or judgment, &c., upon the strength of parol proof? In *Henkle vs. The Royal Exchange Assurance Company*, 1 Vez., 317, Lord Hardwicke said: "The court of chancery had jurisdiction to relieve in respect to a *plain mistake*;" and again he said: "It must be proper proof and the *strongest possible proof*." Lord Thurlow in *Irnham vs. Child*, 1st Bro. Ch. Rep., 94, said, that "a mistake creating an equity *dehors* the deed, should be proved as much to the satisfaction of the court as if it were *admitted*." Lord Eldon in the case of *The Marquis of Townsend vs. Stangroom*, 6 Vez. 328, stated, "that those who undertook to rectify an agreement by showing a mistake by parol proof undertook a task of great difficulty." Here then we have the con-

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current judgment of three of *England's* ablest and most distinguished chancellors, to the effect that where a written contract of any character is sought to be corrected, or reformed, by the force of parol evidence, the proof must be of the strongest and most demonstrative character. In one of the cases *Lord Thurlow* said, "that there is no instance of such testimony prevailing, in which the party against whom the mistake is sought to be corrected denies the existence of it." This proposition chancellor *Kent*, in the case of *Gillespie vs. Moon*, 2 *Johns. Ch. Rep.*, 585, controverts. He maintains in that case, "that the answer denying the mistake charged in the bill is to be received as evidence, and to have the same weight as in all other cases, but subject to be overcome by the strength of *parol* evidence, under the established rules of evidence in chancery." This view of the chancellor appears to be sensible and it is apprehended to be the sound rule in chancery. But admit this to be the case, still the chancellor, although he granted relief in that case against the answer of the defendant, did not pretend to deny the propriety of the rule requiring great strictness of proof; so far from it, he manifestly adopts the justice and propriety of the rule. The relief was granted in that case, as he states in his own language, upon proof "*clear and overwhelming.*" That this was his view in that case is clear from the language he employs in the case of *Lyman vs. The United States Insurance Company*, 2 *Johns. Ch. Rep.*, 630, decided shortly after. In this case the chancellor says, "the difficulty in this case arises from want of requisite evidence," &c. "The cases which treat of this head of equity jurisdiction, require the *mistake* to be *made out* in the most *clear and decided manner*, and to the *entire satisfaction* of the court." The authorities were reviewed in the decision of the case of *Gillespie vs. Moon*, and a reference was made to the successive opinions of *Lords Hardwicke, Thurlow* and *Eldon*, in favor of the most "*demonstrative proof.*"

This view, as to the amount of evidence required in such cases, appears to have been adopted by the *Maryland* courts. In the case of *Watkins and Stockett*, 6 *H. & J.*, 435, chan-

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cellor *Johnson* expresses himself in the following manner: "When men of sufficient understanding come to a settlement of their various transactions, and enter into solemn instruments of writing, purporting to settle the amount *due* from *one* to the *other*, such adjustment should not be shaken, except upon the most *irrefragable proof*;" and at another part of his opinion, "by *evidence clear and incontrovertible*." In the same case, *Judge Archer* adopts the language of *Lord Thurlow*, that the proof of the mistake should be established, "as much to the *satisfaction* of the court, as if it were admitted, and that the difficulty of doing this is so great, that there is no instance of its prevailing against a party insisting there is no mistake." Upon the strength of authority, the rule must be received as well established, that where a party files his bill in chancery, charging a mistake in a written contract, note, judgment, &c., and seeks relief from such alleged mistake by the force of parol evidence, he must make out a *plain mistake*, and sustain it to the *entire satisfaction* of the court, by the most *demonstrative evidence*.

The difficulty in this case is not to be found in any doubtful rule of law, but the difficulty, (if in truth it can be said there is any,) lies in the strength and character of the proof by which the mistake charged in the bill is sought to be established. The question, then, for the consideration of this court is, does the proof establish a *plain mistake* by *evidence*, clear and demonstrative, to the entire *satisfaction* of the court? The solution of this question must depend upon the facts and circumstances disclosed by the proof in the case.

What are these facts and circumstances as they are found in the record? They will now be examined. On the 16th day of March, 1840, the complainant gave his promissory note to *Jacob Brewer of J.*, for \$1744 89. On the 10th of April, 1840, he paid on the said note, \$100. On the 17th of August, 1840, the complainant confessed judgment on the said note in *Washington* county court, in favor of *Brewer*. On the 8th of September, 1845, this judgment was, by the agreement of the parties, entered satisfied, and a new judgment for the same

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debt, embracing the accumulated interest, was confessed on the same day, in favor of the said *Brewer*, for \$2179.19, bearing interest from the 25th of August, 1845, with a stay of two years, and all errors released. *Jacob Brewer*, in his lifetime, on the 30th of July, 1846, assigned the last named judgment to *Jacob Snyder*, and guaranteed its payment, and it was entered for his use. *Snyder* afterwards died, and on the 8th of May, 1847, and sometime after the death of *Jacob Brewer*, the complainant paid to *John M. Snyder*, the administrator of *Jacob Snyder*, \$550, in part of the said judgment. On the 30th of April, 1847, *John M. Snyder*, the administrator of *John*, assigned the said judgment to the amount of \$1850, to *Edward Hubble*. *Jacob Brewer of J.*, died in the autumn of 1846. That sometime previous to the death of *Jacob Brewer of J.*, the complainant admitted his indebtedness to him, in the year 1842, in the amount of the judgment, or nearly so, in the presence of *Thomas Draper*, a witness examined in this cause. After all these repeated recognitions of the debt due by him to the said *Jacob Brewer*, which forms the consideration of the note of the 16th of March, 1840, and of the judgment of the 8th of September, 1845, and after the death of *Jacob Brewer of J.*, the complainant files his bill in this court, on the 7th of September, 1847, charging, that the note of the 16th of March, 1840, and the judgment of the 8th of September, 1845, were erroneous, and originated in mistake, and invokes the equitable power of the court to enjoin the execution of the said judgment, upon the ground, that nothing in fact was due to the said *Jacob Brewer of J.*, at the time the note was given, or at the time of the rendition of the said judgment. But how is this mistake made to appear? It is alleged in the bill, that the complainant purchased that part of the real estate of *John Brewer*, deceased, which he devised to his son *Adam Brewer*, and by this means, fell in debt to *Jacob Brewer of J.*, the representative of the estate, to the amount of \$10,526.60. That independent of this debt, the complainant owed nothing to *Jacob Brewer of J.*, with the exception of a small account which still remains due and unpaid. The bill then charges, that said

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Jacob Brewer, as the legal representative of the estates of *John Brewer, Jr.*, *Adam Brewer* and *Matilda Brewer*, upon the distribution thereof in the orphans court of *Washington* county, fell in debt to the complainant, in right of his wife, who was one of the distributees of said estates, to the amount of \$4,234.12; that this sum, deducted from the \$10,526.60, the amount of complainant's purchase, left the complainant in debt to *Jacob Brewer of J.*, in the amount of \$6,291.48. That on the 1st of March, 1837, the distributees had a settlement of the amounts due them from *Jacob Brewer of J.*, upon the distribution of the assets of the said estates in the orphans court of *Washington* county. That upon this settlement, it was ascertained, that *John H. Huyett*, who married *Catharine Brewer*, one of the defendants, was entitled to the sum of \$2,760.48, and that *Elizabeth Brewer*, another of the distributees, was entitled to the sum of \$3,465.62. That upon this ascertainment, it was agreed between the parties, that the complainant should become responsible to these two distributees for the amount due them, and by this mode liquidate the amount due them on the distribution of the aforesaid estates, and at the same time discharge his debt, *pro tanto*, due upon the purchase of said land. That in conformity to this arrangement, the complainant did, on the said first of March, 1837, give his notes to the said distributees, for the amount due them, with *Jacob Brewer of J.*, as one of his securities in the said notes; which said notes have been paid in part, and the balance secured by a judgment. That by this arrangement, the whole amount of complainant's debt upon the purchase of the land had been paid, with the exception of a small balance of \$65.39.

These facts, as set forth in the bill of complaint, so far as they relate to the amount due the complainant upon the distribution of the said estates and the arrangement entered into by the parties on the 1st of March, 1839, fully and satisfactorily appear from the accounts and distributions filed in this cause, and the written admissions of the counsel of the complainant, and defendants, also filed in the case. If, therefore, it can be shown to the satisfaction of the court, that the note of the 16th

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of March, 1840, for \$1,744.89, was given as the consideration in part for the said land purchased by the complainant, then a clear and palpable mistake will be made out fully to the satisfaction of this court. But how does it appear that the note was given in part of the consideration for the said land? For the purpose, and with a view of establishing this fact, the parol testimony of *Mrs. McRea* is introduced, who states, that some time in the year 1845 or 1846, *Jacob Brewer* came to her house for the purpose of signing with her three deeds. That in the course of conversation, *Brewer* stated, that *Beard* owed him near \$2,000. The witness asked him how *Beard* came to get so much in debt to him? *Brewer* replied, that he and *Beard* had not had dealings together; that this debt came out of the land; that *John Huyett* was not willing to take all his portion out of the land, but that he, *Brewer*, was no way afraid, and would take all his out of the land. The witness states, that the land referred to was the land which the complainant had purchased. Now if these declarations of *Jacob Brewer of J.*, are truly remembered and correctly represented, of what value are they in establishing the mistake charged in the bill? They are certainly very loose and unsatisfactory in connexion with the circumstances disclosed in the record. How could it be that *Huyett* had refused to take all the remaining portion of his distributive share in the estates, when the facts stated in the complainant's bill, and the admissions and proof in the cause abundantly prove that he had actually done so? And how could *Jacob Brewer* be willing to receive his portion out of a fund he knew not to be due? At all events it is clear, the note could not have been given in part of the consideration for the land, and at the time it was given neither *Jacob Brewer of J.*, nor the complainant could have so understood it; for as early as the 1st of March, 1837, the land had been settled for, and the fact was known to both parties. But the idea that the note was given in part of the consideration for the land, is incompatible with the theory of the complainant's bill. The bill proceeds upon the ground, that on the 16th of March, 1840, the complainant not being indebted to *Jacob Brewer of J.*, was in-

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duced by him to give him the note in question, upon a representation made by the said *Brewer*, that the note was required either for a part of his, *Jacob's*, share in his father's estate, or for a debt due him from his father's estate. This charge in the bill clearly demonstrates, that at the time the note was given, it was not received or passed as a part of the consideration of the land. But if it can be shown by satisfactory proof in the case, that the note was obtained from the complainant by such representations, it would give a fraudulent character to the transaction rather than that of a *mistake*, and consequently, as fraud is not charged no relief can be granted on that ground. But admit that this allegation of the bill embraces the charge of a *mistake*, how is it sustained? The testimony on this point rests in parol, and reliance is placed solely upon the frail memory of a single witness, unaided by a single pregnant circumstance in the cause. What is that testimony? *John H. Huyett*, a witness examined on the part of the complainant, represents, that sometime in the year 1844, he asked *Brewer* if it was true that the complainant owed him \$1,600? that *Brewer* answered, "do you suppose I have nothing to get," and further remarked, "that he held a claim against his father's estate, for money lent and not satisfied, and had his interest in his father's estate; and that his claim against *Beard* was made up of both of these." This testimony is relied upon in the able and ingenious argument of the complainant's counsel, to show the consideration upon which the note in question was obtained from the complainant, and infers from the facts thus disclosed, that the pretended consideration had no foundation in fact. For how, he very properly inquires, could a note of the complainant discharge a debt due *Beard* from his father's estate, or any portion of his interest in his father's estate? Hence the conclusion is drawn, that the consideration for said note, as represented by *Brewer* to *Huyett*, could not in reason and sound sense be regarded as the true consideration of the said note, and as *Mrs. McRea* in her testimony represents *Brewer* as having stated that his transactions in business with the complainant, were confined exclusively to the purchase

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of the land heretofore referred to, the counsel concludes the note in question must have been given on account of the land, and as that had been paid for, the inference was irresistible, that the note was founded in *mistake*.

It has been shown that the testimony of *Mrs. McRea*, from its character, was too uncertain to be relied upon in determining the true character of the case under consideration. It has also been shown that the note could not have been given on account of the land, and was not so understood at the time it was given, either by the complainant or defendant. The value placed upon *Huyett's* testimony, as it stands disclosed in the record, by the complainant's counsel, in the estimation of the court, is just, for it is difficult, indeed, to imagine how a note of the complainant to *Jacob Brewer, of J.*, could be made to discharge a debt due him from his father's estate, or any portion of his interest in his father's estate. But while it is admitted that this testimony does not exhibit any satisfactory evidence of the true consideration of the note, it is equally true it does not furnish any satisfactory evidence that the note itself was founded in mistake. This testimony as it is disclosed in the record, obviously is without meaning, and shows that the true state of the transaction is not to be found in such testimony. If the complainant was a sane man, (and there is no proof in this cause to show he was not,) he could not have given his note for so large a sum of money, upon such a senseless representation. And *Jacob Brewer, of J.*, if he is a man of common understanding, could not have made such a representation to the complainant, with a view of obtaining the note, or to the witness afterwards in attempting to account for the manner in which the note was obtained. To give any importance to such testimony, would involve the sound sense of both complainant and defendant. This conversation of *Jacob Brewer, of J.*, held with *Huyett*, requires explanation, and it is not found in the record. It does not appear that *Huyett* inquired of *Brewer* the meaning he designed to convey by the language he is represented to have employed. If the witness had made the proper inquiry, the true state of the

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case might have been unfolded. If he had been asked how such a note could have been made to pay such a debt? *Brewer* might have replied that the estate of *John Brewer*, his father, was indebted to him in some \$2000, and that he, *Jacob Brewer*, had advanced this sum out of his father's estate to the complainant, who was in pecuniary difficulty at the time, and that what he meant by stating that this debt was not yet paid, was, that he was not yet in the enjoyment of it, but had advanced it to the complainant to relieve him from pecuniary difficulty. This explanation would have been sensible and satisfactory. This part of the testimony as it stands disclosed, is without meaning, and entirely unsatisfactory to the mind of the court. It is worthy of remark, that both *Mrs. McRea* and *Huyett* state that they know nothing of the money transactions of the complainant and *Jacob Brewer of J.*, except what is contained in the declarations of *Brewer* testified to by them, and neither of them was present when the said note was given. At all events, the whole proof relied upon by the complainant to make out the charge of a mistake, consists in the unaided naked confessions of *Jacob Brewer of J.*, testified to by *Mrs. McRea* and *Huyett*, in the conversations he is represented to have held with them. These confessions are too loose and unsatisfactory, and do not, in the judgment of this court, furnish evidence sufficiently clear, in the language of the courts to prove a *plain, palpable mistake*.

The danger of such testimony, (resting as it does in *parol*,) in unsettling contracts of parties reduced to writing, is clearly illustrated by Chancellor *Kent*, in the case of *Marks vs. Pell*, 1 *John's Ch. Rep.*, 594, in which he says: "Such conversations are extremely liable to be misunderstood, and when unsupported by other facts unsafe to be relied on," &c. Much reliance seems to be placed upon the fact that the complainant was in delicate health during the progress of the settlement of the various estates in the hands of *Jacob Brewer of J.* These estates are admitted by the counsel to be correctly settled. The ill health of the complainant, was not, therefore, any disadvantage to him in this respect. But there is one potent

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fact which is adverse to any claim the complainant can have in asking this court to exert its power to grant the relief he invokes. He states in his bill, that on the 15th of March, 1840, the date of the note upon which the judgment in question was rendered he suspected it was not correct. It was further proved that for the last eight years the complainant has been fully able to attend to his business transactions. And yet from the year 1840, to the latter part of the year 1846, during the life of *Jacob Brewer of J.*, he makes no effort to correct any supposed error, or even to intimate his suspicions on the subject. So far from it, he repeatedly, from the 18th of March, 1840, up to the period of *Jacob Brewer's* death, recognised the justice of the said debt in the most solemn manner. Let the decree be drawn dissolving the injunction and dismissing the bill with costs." From this decree the complainant appealed.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

By GEO. SCHLEY and F. A. SCHLEY, for the appellants, and

By PRICE for the appellee.

MAGRUDER, J., delivered the opinion of this court.

In a case like this the court may not be certain that a complainant is not entitled to any portion of the relief which he asks, and yet may be bound to dismiss his bill. The evidence on which he relies must be satisfactory, indeed, that the mistake which he charges was committed.

More than seven years before the bill was filed, the original complainant gave to the intestate of one of the defendants his note, and shortly afterwards confessed judgment for the amount due on said note. As late as the year 1846, this judgment being ended satisfied, a second judgment was confessed for the sum then due.

The language of *Lord Thurlow*, 1st *Brown's Chy. Reports*, 93, may be too strong, but in all such attempts as this it has

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been required of the party seeking to be relieved upon the ground of mistake, to produce, if not quite, almost incontrovertible proof, or to use the language of a distinguished chancellor, "proof clear and overwhelming." It cannot be believed that the testimony of *Mrs. McRea* or *Huyett*, is of this description. Both of them tell us that the creditor insisted upon the justice of his claim, though they probably misunderstood, or have forgotten what he said when stating how it originated.

In all such cases as this, it is required that the party, who is injured by a mistake, should take steps promptly to get relief. But the complainant himself says, that when he signed the note he was "not satisfied that he owed the money to said *Brewer*, but he has always entertained misgivings in relation to it," &c. Surely then he has been guilty of great *laches*, and cannot complain if by reason thereof he is a sufferer.

The person, moreover, of whom relief is sought, is not the original creditor, but the individual to whom the judgment was assigned, we must suppose for a valuable consideration. The note and original judgment were given in 1840. A second judgment was confessed in 1845. In 1846 this judgment was assigned to *Snyder* for whose use it was entered. The year following a considerable payment was made to the administrator of *Snyder*, who after all this assigned the judgment to *Hubble* one of the defendants. Is *Hubble* to be deprived of his remedy by execution at law? We cannot think so. Surely these assignees have a superior equity to any that the complainant has been able to show. See *Kemps Exc'x vs. McPherson*, and the cases there cited, 7 *H. & Johnson*, 320.

We think that the learned judge in the court below, has conclusively shown that no relief can be given in this case.

DECREE AFFIRMED WITH COSTS.

Chelton vs. Henderson and wife's Lessee—1850.

WM. H. CHELTON vs. ROBERT HENDERSON AND WIFE'S
LESSEE.—*December 1850.*

A testator by his will, executed in 1788, devised as follows: "I give and bequeath to my son, *I. D.*, the use of the plantation whereon I now live, to him, the said *I. D.*, during his natural life, and if it should please God that the said *I. D.* should have issue born of his body lawfully begotten, then such issue after the death of the said *I. D.*, to have the aforesaid devised premises in fee tail, but if the said *I. D.* should die without issue of his body lawfully begotten," then over to his son *T. D.*, in fee simple. **Held:** That under this devise, *I. D.* took only a life estate, and not an estate tail general, and that the rule in *Shelley's case* does not apply.

This rule is not an imperious rule of law which must control the operation of a will, no matter how clearly a contrary intention may be expressed upon its face, but it is a rule of construction that must prevail, except in cases where a contrary intention satisfactorily appears by the will itself.

It was established in *England* as a convenient and necessary rule of construction, by which the intention of the testator was to be effectuated, not defeated.

Even if in such a case in *England*, the technical import of the word "heirs" should be regarded as conclusive evidence of the intent of the testator, that the rule should operate and countervail all other expressions in the will indicating a contrary intent, yet it does not follow that the same principle must govern a case where the word "heirs," is not used.

The word "issue," is a term of equivocal import, being either a word of limitation or of purchase, according to the intent of the testator, deduced from the expressions contained in the will.

In *England*, every inference is in favor of the rights of primogeniture, and all presumptions are in favor of the acquisition of title to land, by descent rather than by purchase.

In *England*, the word "issue," when used in a will, is construed a word of limitation and not of purchase, unless the intent of the testator to use it as a word of purchase, is so conclusively shown by other expressions, as to repel such an interpretation.

In this State, since the act of 1786, no partialities or presumptions in favor of primogeniture or heirs at law, can, as applicable to a case like the present, be said to exist.

The right of testamentary disposition, where the intent of the testator satisfactorily appears, is to be favored and fully effectuated, unless in contravention of some established principle of law, over which the intent of the testator can exert no control.

Courts of justice will be astute in discovering the real intent of the testator, and the means by which that intent is to be carried into effect.

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The act of 1786, ch. 45, abolished the right of primogeniture, and made all estates tail general thereafter acquired, to descend as fee-simple estates, and by the act of 1782, ch. 23, an estate in fee-tail may be conveyed in the same manner as an estate in fee simple.

The clear intent of the testator in this will, was that his son, *I. D.*, should enjoy the plantation during his life, and if he should have "issue," such "issue," after his death, should have the land in fee-tail.

The rule in *Skelley's case*, has, in this State, in a case like this, no principle of reason, expediency or policy to sustain it, and it would wholly defeat the clearly expressed intent of the testator.

This court cannot assent to the doctrine that the rule in *Skelley's case*, must be applied without reference to testamentary intention, as applying to cases since the act of 1786, ch. 45. That rule is not applicable to a case like this.

In construing wills since the passage of the act of 1782 and 1786, we must look not merely to the law as it prevails in *England*, but to its altered condition in this State since the passage of those acts.

APPEAL from *Somerset* county court.

Isaac Dixon died in July 1788, leaving a last will duly executed, to pass real estate, on the 9th of May, 1788, in which, after giving to his wife a life estate in one-third of the plantation on which he resided, devised as follows:

"2nd. I give and bequeath to my son *Isaac Dixon*, the use of the said plantation whereon I now live, (except the third part already disposed of,) to him, the said *Isaac*, during his natural life, and if it should please God that the said *Isaac* should have issue born of his body, lawfully begotten, then such issue, after the death of the said *Isaac*, to have the aforesaid devised premises in fee-tail, but if the said *Isaac* should die without issue of his body lawfully begotten, it is my will and desire that the above mentioned lands and premises, with all other rights and claims in my lands whatsoever, shall descend to my son *Thomas Dixon*, and his heirs in fee-simple."

Isaac Dixon, the devisee in the will, entered upon the lands after the death of the testator, and in 1796, married and had issue, an only child, *Isaac Dixon, Jr.*, and on the 10th of June, 1822, executed a deed conveying the lands in question to his said son, *Isaac Dixon, Jr.*, "during his natural life," "and after the decease of the said *Isaac Dixon, Jr.*," to his

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grandson, *William Thomas Dixon*, son of the said *Isaac Dixon, Jr.*, "his heirs and assigns forever," and died in August, 1823.

William Thomas Dixon, the grantee in remainder in said deed, died in 1828, intestate and without issue, leaving a sister *Margaret*, the wife of *Robert Henderson*, the appellee, his only heir at law. *Thomas Dixon*, the son of the testator, and devisee in remainder in the will, survived his father, and was unmarried and without children at the death of the testator.

In July 1823, one *Samuel Tull* recovered judgment against *Isaac Dixon, Jr.*, the grantee for life in the deed of the 10th of June, 1822, upon which judgment a *fi. fa.*, was issued and the lands in question were levied upon and sold at sheriff's sale on the 8th of April, 1824, being then in possession of the said *Isaac Dixon, Jr.*, to one *William Roach*. The lands were afterwards conveyed by *Roach* to one *Henry Lankford*, and by him to *Fleet Chelton*, who leased them to the appellant.

In November 1847, *Robert Henderson* and *Margaret* his wife, the latter being the only heir at law of *William Thomas Dixon*, the grantee in remainder in the deed of the 10th of June, 1822, brought their action of ejectment to recover these lands, and at the trial, the above facts having been admitted, the plaintiffs prayed the court to instruct the jury that by the true construction of the said will of *Isaac Dixon*, the testator, *Isaac Dixon*, the son of the said testator named in said will, took an estate-tail general in the plantation mentioned in the said will, which instruction the court, (TINGLE, A. J.,) granted, and the verdict and judgment being for the plaintiffs, the defendant appealed.

The cause was argued before DORSEY, C. J., SPENCE, MAGRUDER, MARTIN and FRICK, J.

By WATERS and CRISFIELD, for the appellant, and
By DONE and WM. W. HANDY, for the appellees.

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DORSEY, J. delivered the opinion of this court.

A statement of but few facts being necessary to explain the nature and origin of the controversy in this case, a brief enumeration of them, so far as it may be necessary for that purpose, would perhaps greatly facilitate the comprehension of the opinion, we may express upon the subject. *Isaac Dixon* the testator, being seized in fee of the lands in question by his will dated the 9th of May 1788, and admitted to probate on the 15th day of July of the same year, devised the lands in question to his son *Isaac Dixon* (who shall be denominated as "*Isaac Dixon* the second") "during his natural life, and if it should please God that the said *Isaac* should have issue born of his body lawfully begotten, then such issue after the death of the said *Isaac*, to have the aforesaid devised premises in fee-tail, but if said *Isaac* should die without issue of his body lawfully begotten, it is my will and desire that the above mentioned lands and premises, with all other rights and claims in my lands, shall descend to my son *Thomas Dixon* and his heirs in fee-simple." Under this devise *Isaac Dixon* the second, entered and was seized of the premises, and by a deed in due form of law, on the tenth of June 1822, conveyed the same as far as he was competent to do so, to his son *Isaac Dixon, Jr.*, (who for distinction sake shall be called *Isaac Dixon* the third) and after his decease to *William Thomas Dixon*, the son of *Isaac Dixon* the third, his heirs and assigns forever. *Isaac Dixon*, the third, having previously departed this life, *Margaret Henderson*, the heir at law of *William Thomson Dixon*, and *Robert Henderson* her husband, instituted the present action of ejectment. It is unnecessary to state the facts constituting the appellant's claim to the land in dispute, and under which he held possession thereof, as the right of a plaintiff in ejectment to recover, depends upon the sufficiency of his own title, not upon the insufficiency of that of his adversary.

Upon this appeal but one question presents itself for determination by this court, and that is, did the county court err in granting, as stated in the appellant's bill of exceptions, the prayer of the appellee, that under the will of *Isaac Dixon* the

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testator, *Isaac Dixon*, (the second,) the devisee took an estate-tail general, in the plantation thereby devised? This case has been argued at great length, and with much ability by the counsel engaged in it, and all the adjudications upon the subject both in *England* and in the *United States*, have been presented to the consideration of this court. The rule in *Shelley's case*, as it is called, has been pressed upon us as an inflexible rule of law, conclusive upon the question before us, no matter what may have been the intention of the testator, as disclosed in the provisions of his will. In our opinion this rule, at least in testamentary cases, is not so to be regarded. It was established in *England* as a convenient and necessary rule of construction, by which the intention of the testator was to be effectuated, not defeated. It is not there an imperious rule of law, which must control the operation of the will, no matter how clearly a contrary intention may be expressed upon its face, but it is a rule of construction, which must prevail except in cases where a contrary intention satisfactorily appears by the will itself. The rule as announced in *Shelley's case*, is where the limitation over is to "the heir or heirs of the body" of the tenant for life. Even if in such a case in *England*, the technical import of the word "heirs" should be regarded as conclusive evidence of the intent of the testator, that the rule should operate and countervail all other expressions in the will indicating a contrary intent, yet it by no means thence follows that the same principle must govern the case now under consideration, where the word "heirs" has not been used. According to all the decisions in *England* and in the *United States*, "issue," which is in the will before us is a term of equivocal import, being either a word of limitation or of purchase, meaning heirs of the body or children, according to the intention of the testator deduced from the expressions contained in his will. How in the present case the testator intended that the word "issue" should operate, we think there is no room for any reasonable doubt. Whether according to the principles of law and rules of construction prevailing in *England*, as established by the numerous decisions there

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made upon such subjects an *estate-tail* in the devisee would be created or not, we deem it unnecessary to inquire. In *England* every inference and implication is in favor of the rights of primogeniture. All presumptions are raised in favor of the acquisition of title to land by descent rather than by purchase. And in accordance with such presumptions and in furtherance of that mode of acquiring or passing title, is the intention of a testator assumed to have been. For these and other reasons for the most part inapplicable to devises of land in *Maryland*, since the passage of our act of descents, the word "issue," when used there in a will, has been construed, a word of limitation and not of purchase, unless the intention of the testator to use it as a word of purchase, *descriptio personarum*, is so clearly shown by other expressions in the will as conclusively to repel such an interpretation. In the *State of Maryland*, since the act of 1786, no such partialities or presumptions in favor of the rights of primogeniture or heirs at law, can as applicable to cases like the present, be said to exist.

The right of testamentary disposition where the intention of the testator satisfactorily appears is to be favored, and fully effectuated, unless its exercise be attempted in contravention of some established principle of law, over which the intention of the testator can exert no control. The testamentary will and intention, are restricted by no other principle of law, or governmental policy. On the contrary, courts of justice will be astute as well in discovering the real intention of the testator, and the means by which that intention is to be carried into effect, as in securing to the objects of the testator's affection and bounty, the enjoyment of the property devised in the mode, and for the time that it is given, as far as is consistent with those principles which have been established as the great landmarks controlling such dispositions of property.

By our act of descents passed in December session 1786, ch. 45, and to commence its operation on the 1st of January 1788, the right of primogeniture was abolished, and all estates "in fee-tail to the heirs of the body generally created or acquired after the commencement of this act," of which the owner should

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die intestate, were made to descend to his heirs as if they were fee-simple estates.

By the act of 1782, ch. 23, an estate in fee-tail may be conveyed in the same manner that an estate in fee-simple can.

Applying these preliminary statements and remarks to the will before us, and advertng to the times and circumstances of its execution and the nature of the provisions, it may fairly be presumed that the testator understood the nature and effects of an estate tail, and the obvious effect upon it, wrought by the two acts of Assembly, which have been referred to. Under such circumstances, to what conclusion must every intelligent man as well as lawyer arrive, as to the testator's intention in inserting in his will the clause, we are now called on to interpret? It must be that the testator designed that *Isaac Dixon* the second, (the devisee) should enjoy the plantation in dispute during his natural life, and that if he should have "issue," such "issue," after the death of the devise should have the devised premises in fee-tail. Such in effect are the very words of the testator. His intention then being manifest and being distinctly and fully disclosed by the expressions of the will, what is the obvious duty of the court? To impose on the will such a construction as accords with and will effectuate such intention, and not to apply to it a technical rule of construction, which at present, in *Maryland*, has in a case like this no principle of reason, expediency or policy, to sustain it, and the undeniable effect of which is wholly to defeat every portion of the clearly expressed intent of the testator. By the explicit terms of the will the interest of the devisee in the devised premises was to continue but during his natural life, and it is not unworthy of notice that the devise does not purport to give to him even for that period the plantation itself, but "the use" of it. Thus confining the devisee, as the testator supposed, to a mere usufructuary interest for life. Why was this restricted, guarded mode of expression, resorted to? There could have been but one reason for it. It was manifestly designed to show the limited character of the life estate conferred on the devisee, and to repel every implication of his taking such an estate as would de-

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stroy or enable him to destroy the limitations over to his issue and contingently to his brother *Thomas*. That it was the intention of the testator deducible from the language of the will, to give to the devisee, *Isaac Dixon* the second, an estate-tail, has not been and could not be with any semblance of rationality contended for in the argument before us. But it is said that the indication or existence of such intention is immaterial, that the application of the rule in *Shelley's case* must be made without reference to testamentary intention. To this doctrine thus broadly asserted, as applying to cases in *Maryland* since January 1788, we never can subscribe our assent, and we utterly deny the applicability of the rule in *Shelley's case* to such a case as that now before us, where the clear and unequivocal expressions of the will demonstrate that the intention of the testator was in direct conflict with that ascribed to him by the application of the rule in *Shelley's case*.

As an authority to sustain the position we have assumed that in construing the will before us, we must look not merely to the law as it prevails in *England*, but to its altered condition in *Maryland* since the passage of our acts of Assembly of 1782 and 1786, we would refer to the case of *Smith and wife vs. Chapman* and others, 1 *Hen. and Munf.*, 240, where it was held that "in construing wills made since the acts of Assembly of 1776 and 1785, on the subjects of estates-tail, it seems that the courts in this country will not by implication turn an express estate for life, with limitations over in remainder into a fee-tail, (as in like cases in *England*,) because although it is done there to effectuate the general intention of the testator, such a construction under the operation of our laws would defeat that intention."

Dissenting from the county court in its granting of the prayer of the appellees as stated in the appellant's bill of exceptions, its judgment is reversed, but no procedendo awarded.

JUDGMENT REVERSED,

Hannon's Exc'rs, vs. The State, use of Robey and wife.—1851.

HENRY M. HANNON AND OTHERS, EXC'RS OF WALTER W. HANNON, vs. THE STATE OF MARYLAND, USE OF WILLIAM G. ROBEY AND GRACE ANN HIS WIFE.—June 1851.

An appeal was taken from *Charles* county court, on the 27th of March, 1846, and the record was not filed in this court until the 25th of May, 1848. The appellee moved to dismiss the appeal, because the record was not transmitted within the nine months, and read a certificate of the clerk of the county, under the seal of the county court, stating that the record was detained in said office by a verbal order of the appellant's counsel. **Held:** That this certificate is not legitimately before this court for any purpose; it has none of the attributes of legal evidence, and the appeal is protected by the act of 1842, ch. 288.

A testator gave to his daughter by will, one-third of the personal property he might die possessed of, not otherwise willed or disposed of. To an action by the legatee against the executors to recover this legacy, the defendants pleaded that they had paid to the plaintiff the full amount of her proportion of the estate of her father, and on this plea, issue was joined. **Held:** That under this plea it was competent for the executors to give in evidence a deed, executed by the testator in his lifetime, conveying to his sons one-half of the personal estate of which he might die possessed, in order to reduce the aggregate amount of the estate, out of which the plaintiff was to receive her proportion.

A grantor conveyed by deed of gift to his two sons, "one-half of all my personal estate of which I may die possessed." **Held:** That this deed was competent to pass to the grantees one-half of the personal estate which could be shown by parol proof to remain in his possession at the time of his death, after payment of his debts and other proper expenses and charges of administration.

A deed conveying to a grantee all the personal property of the grantor, without describing particular articles, will pass all that may be proved by parol testimony to have belonged to the grantor at the date of the deed—a description of particulars is not necessary.

Every sane man has authority to give away his property by deed, unless he attempts to give it upon terms which the law repudiates as against sound policy.

APPEAL from *Charles* county court.

This was an action of *debt*, brought in 1840, by *William G. Robey* and *Grace Ann*, his wife, the appellees, against the appellants on their bond, as executors of *Walter W. Hannon*, to recover a legacy claimed by the said *Grace Ann*, under the

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will of the testator. The defendants pleaded *general performance*, and the plaintiffs replied by setting out the will and the amount claimed in the usual form. The case was tried in 1841; and on appeal by defendants, this court reversed the judgment, and sent the case back on a *procedendo*. The defendants then filed a rejoinder, averring: 1st. That they had paid the plaintiffs the sum of \$3,520.52, claimed in the replication; and 2nd. That they had paid the plaintiffs the full amount of their proportion of the estate of said *Walter W. Hannon*. The plaintiffs surrejoined and traversed the averments of the rejoinder, and on these traverses, issues were joined.

EXCEPTION. The plaintiffs then offered in evidence the will of *Walter W. Hannon*, duly executed on the 16th of May, 1838, and admitted to probate on the 18th of September, containing among others, the following bequest: "*Item*. I also give and bequeath to my daughter, *Grace Ann Robey*, one-third part of my personal property I die possessed of, and not otherwise willed or disposed of;" and further gave evidence showing that there remained, on the 16th of March, 1841, in the hands of the defendants as executors, after payment of debts, specific legacies, &c., the sum of \$3000, to which the said *Grace Ann Robey* was entitled under the will. The defendants then offered to read in evidence a duly authenticated copy of an indenture or deed of gift from *Walter W. Hannon, Sen.*, to his two sons, *Walter W. Hannon, Jr.*, and *Henry M. Hannon*, duly executed, acknowledged and recorded, and bearing date the 8th of September, 1832, in which the grantor, "in consideration of natural love and affection, and for the better maintenance, support, livelihood and preferment," "of his said sons," gives, grants and confirms unto his said sons, "their heirs and assigns, one-half of all my personal estate of which I may die possessed." To the admissibility of this instrument of writing, the plaintiffs objected, and the court, (MAGRUDER, C. J., and KEY, A. J.,) sustained the objection, and refused to permit the same to be read in evidence, and the defendants excepted.

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Judgment was rendered for the plaintiffs on the 27th of March, 1846, and on the same day the defendants prayed an appeal. The transcript of the record was filed in this court on the 25th of May 1848, and the appellees moved to dismiss the appeal because the transcript was not transmitted to this court within the nine months required by law, and read a certificate of the clerk of *Charles* county, under the seal of the county court, stating that the cause of the delay in sending the record, was owing to an order given either by *Hannon* or one of his attorneys, not to send the same until further orders should be given by said attorney or *Hannon* himself.

The cause was argued before DORSEY, C. J., CHAMBERS, MARTIN and FRICK, J.

CAUSIN for the appellants, on the merits, contended that the court erred in rejecting the evidence offered, because under the pleadings it was admissible, in order to reduce the personal estate out of which the legacy claimed was to be paid, the said deed or bill of sale being a valid transfer of one-half of said personal estate, binding on the grantor, and those claiming under or from him.

TUCK for the appellees, contended that the evidence was properly rejected. 1st. Because the paper offered in evidence did not purport to be a testamentary paper. 2nd. Because there was no issue in the cause to which said evidence was applicable. And 3rd. Because such deeds are not required to be recorded, and the copy offered in evidence was inadmissible.

CHAMBERS, J., delivered the opinion of this court.

A preliminary question has been raised in this case, upon the ground that the record was not filed in this court within nine months from the day the appeal was taken; and a certificate has been read by the appellant's counsel, in which the clerk of *Charles* county court declares, it was by a verbal order of the appellant's counsel that the record was detained in his office.

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We cannot recognize that certificate as being legitimately before us for any purpose. It has none of the attributes of legal evidence.

Upon an inspection of the record, we find it to state, that an appeal was duly taken at the time the judgment was rendered, and we find in it nothing to indicate a default on the part of the appellant.

We therefore think the case protected by the act of 1842, chap. 288, and overrule the motion to dismiss the appeal.

The only question arising on the bill of exceptions is, whether the sealed instrument of the 8th September, 1832, executed by *W. W. Hannon* to his son *W. W. Hannon, Jr.*, and *Henry M. Hannon*, was admissible as evidence in the cause, under either of the issues joined.

In a former trial of this cause, that paper was given in evidence, as a testamentary paper, but the subsequent proceedings in the case make it impossible to regard it now in that character.

The appellee's counsel in one part of the argument, seemed to assume, that because it was decided not to be operative as a part of the last will and testament of *W. W. Hannon*, therefore it could not have any legal operation. This does not by any means follow.

It is a solemn deed, executed with due formality, for a consideration just as sufficient against the party and his legal representative as a full and ample pecuniary consideration, actually advanced; and is not impeached by any pretence of fraud or imposition.

Clearly, every sane man has authority to give away his property, unless he attempts to give it upon terms which the law repudiates as against sound policy. He cannot give it to be held in perpetuity, or by any tenure not consistent with the rules of law, nor may he devote it to impolitic or criminal objects.

This deed professes to transfer personal property to children of the grantee. It does not profess to create a perpetuity, but but is to be held by them as their absolute property. It is said, that the grantor did not grant what he then had in possession,

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but what he might possess at the time of his death. This objection assumes, that if the grant had been of the personal property then in possession of the grantor, to be delivered to the grantees at his death, it would have passed the grantor's title. We think such has been recognized to be the law. 9 G. & J., 77, *Hope and Hutchins*.

There a mother gave specific property to her child, reserving to herself, during her life, the use of the property and its increase, and this court sustained the title of the child derived under that instrument.

If then, the deed was sufficient to pass any part of the property of the grantor, had it been specifically described, it would we think of necessity, operate upon any article of property which, by parol testimony, could have been proved to have been in the grantor's possession at the date of the deed, and which remained in his possession at the time of his death.

According to this theory, then, the testimony should have been admitted as a first link in a chain of testimony, to be, thereafter, followed by parol proof.

It is, however, objected, that the state of the pleadings did not justify the production of such evidence, because the sole question was, whether "payment" had or had not been made? If this be so, then, upon this issue, there would not only be no necessity to furnish proof of the amount of assets to be distributed, but if, on the face of the will itself, it should appear, that the plaintiff was to receive one-tenth of the surplus, he might recover one-third of the estate, provided his pleadings claimed a third.

Now what is the issue in this case? The defendants in their rejoinder allege, that they, the executors, had fully paid to the plaintiff "the full amount of his proportion of the estate of her father." In this language the issue is joined. The terms of this issue bring before the jury, in the broadest form, the consideration of what was "the amount of plaintiff's proportion of the estate." Admitting, for the sake of this argument, that the rejoinder, which tenders an issue of payment of the precise sum now mentioned, would exclude all evidence

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going to show the amount of estate, (and it is only so assumed for the purpose, without an intention so to decide,) yet, under the peculiar language of the issue above mentioned, we must consider the evidence as admissible, for the purpose of showing what was the amount of the estate, and, of course, what was the plaintiff's proportion; the plaintiff's claim being only to be calculated by ascertaining, in the first place, what was the amount of the whole.

The present record does not, perhaps, strictly present the question, "What did pass by the deed of the 8th September, 1832?"

It must, of necessity, arise at the trial of the cause on the *procedendo*, and we deem it proper to say, that on the best consideration we have been able to give, it was competent to pass to the grantees one-half of the personal estate of the grantor, which should remain in his possession at the time of his death, after payment of his debts and other proper expenses and charges of administration. Taking into view the relations in which the parties stood to each other, it must be regarded as intending to secure to the grantees their proportionate share, as children and co-representatives of their father's estate, at his death. In many cases, such a proceeding might not only be justified, but required by every equitable consideration. We know of no rule of law which is violated by thus securing to a child, by deed, the proportion of the estate which the law would give him as a distributee, in case of intestacy.

The case of *Hope and Hutchins*, has declared the law in the case of a deed for specific property, and if the enumeration of all the articles of personal property possessed and owned by the grantor at the date of the deed, had been given, then those enumerated articles, and the natural increase from such as were capable of such increase, would, according to adjudged cases, have been passed to the grantees. But it is said, this deed is too uncertain for the want of such description, and is therefore void.

In 7 *H. & J.*, 147 *Coale and Harrington*, the court have said, that a deed transferring to a grantee all the personal

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property belonging to the grantor, without any attempt to describe particular articles, will pass all that may be proved by parol testimony to have belonged to the grantor at the date of the deed; a description of particulars is therefore not necessary.

Nor do we find any authority to forbid the transfer of such personal property subsequently acquired, as the grantor may leave at his death. He could have given his bond, payable at his death, for any specific sum. He could have bound himself in a penalty, to coerce his executors to transfer any specific property to the obligee, at his, the obligor's, death. Why will not the same principle apply to such a deed as the present?

On the whole, we conclude, that consistently with the pleadings, the deed should have been admitted, and should have the legal effect to reduce the amount of the estate, which was to prove the aggregate sum, out of which the plaintiff was to receive her proportion.

JUDGMENT REVERSED AND PROCEDENDO.

**JOHN STULL vs. THOMAS D. HURTT, MARTHA E. HURTT
AND OTHERS.—June 1851.**

A vendee agreed to purchase certain lands, for a certain sum, part of which he was to pay on the first of January, 1848, and execute a mortgage of the lands to secure the balance, both of which he failed to do, and at the time the first payment became due, it was proved that he was in embarrassed circumstances, and was pressed by other creditors whose claims he was unable to satisfy. **HELD:** That under these circumstances the vendor was not bound to resort to his remedy at law, before he could enforce his lien in equity.

A vendee contracted in writing to purchase "a farm or tract of land, called *Mother's Care*, containing one hundred and seventy-three acres, more or less," for which he promised to pay the gross sum of \$2300. At the time the contract was made, the vendor, when questioned as to the number of acres, told the vendee that "he had heard his brother say that the old plat

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called for one hundred and seventy-three acres, but he did not himself know the quantity, never having seen it surveyed. **HELD:** That this statement of the vendor cannot be considered such a representation as would make it inequitable to compel the vendee to perform the contract, though the farm was found to contain but one hundred and forty-five acres. If this statement could be regarded as a representation of quantity, on the part of the vendor, the proposition, that it was of the essence and part of the contract, and being so, this large discrepancy ought to entitle the vendee to an allowance for the deficiency, might have some weight.

In the absence of fraud, wilful concealment, misrepresentation or any specific representation of quantity, except as stated in the above contract, from which it clearly appears the land was not sold by the acre, equity cannot be invoked to allow for a deficiency.

In the absence of fraud, the words "*more or less*," must be considered as qualifying the representation of quantity, and neither party can claim relief either for a deficiency or a surplus.

This contract must be considered a sale of lands for a specified sum, in which the words, "*more or less*," are intended to negative any representation of quantity.

APPEAL from the *Court of Chancery*.

The bill in this case was filed by the appellees against the appellant for the specific execution of a contract for the sale of lands. The terms of the contract are stated in the opinion of this court. The bill alleges the failure of the vendee to comply with the terms of sale, his embarrassed pecuniary condition, and other circumstances, showing the vendors to be without remedy at law, and prays that the vendee may be decreed to perform his contract, and in default thereof the lands be sold to pay the purchase money.

The defendant was summoned but not appearing an interlocutory decree was passed against him, testimony taken establishing the allegations of the bill, and a decree passed for the sale of the lands. After the decree and after the trustee had advertised the property for sale, the vendee filed a petition excusing himself from not making defence at the proper time, and alleging, that while the negotiation was going on and at the time of the contract, the vendor represented that the number of acres specified in the contract (one hundred and seventy-three acres) was shown to be the true number by an old plat,

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but that subsequently, and after the first payment had been made and possession delivered, the vendors caused a survey of the land to be made, by which it appeared that it only contained one hundred and forty-five acres, one rood and thirty-perches, and praying that the trustee might be prohibited from selling, the decree vacated, or allowed to stand only as a security for the performance by the petitioner of his contract of purchase, after such deductions from the purchase money, on account of deficiency, as he might appear to be entitled to.

Thomas D. Hurtt, the party who made the contract of sale for himself and the other vendors, answered this petition, expressly denying all misrepresentation in reference to the quantity of land or in any other respect. The answer, however, admits, that in the course of the conversation of respondent with the agent of the vendee, with whom the contract was made, the agent inquired if respondent knew the quantity of the land? that respondent told him he did not, he had never seen it surveyed, but he had heard his brother say the *old plat* called for one hundred and seventy-three acres. The answer also admits that said farm contains but one hundred and forty-five acres, two roods and four perches.

Upon this petition and answer the chancellor (JOHNSON) passed an order dismissing the petition with costs, and from this order as well as from the decree for the sale of the land, the vendee appealed.

The cause was argued before DORSEY, C. J. CHAMBERS, MARTIN and FRICK, J.

By McLEAN, for the appellant, and
By VICKERS, for the appellees.

FRICK, J., delivered the opinion of this court.

The appellant, by *S. S. Cake*, his agent, agreed in writing with *Thomas D. Hurtt*, to purchase a tract of land called "*Mother's Care*," containing one hundred and seventy three acres, more or less, for the sum of twenty-three hundred dollars;

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first payment of five hundred dollars to be made on the 1st day of January, 1848, at which time possession was to be delivered; and the balance in three annual instalments of six hundred dollars, payable in one, two and three years thereafter. It was further agreed that the appellant was to receive a good and sufficient deed of the land, while at the same time he was to execute and deliver to the appellees a mortgage deed of the premises, as security for the three last payments mentioned in the said agreement.

The land in question belonged to all the appellees, and the appellant himself afterwards recognized, and by his signature on the back, affirmed and endorsed the agreement as his own.

The deed of conveyance of the land was duly executed by the appellees, and tendered to the appellant. At the same time the contemplated mortgage was prepared and presented to the appellant for his execution, which, however, he evaded and delayed until the first payment under the agreement became due. Failing in this payment, the bill was filed alleging the inability of the appellant to pay, even if proceedings at law were instituted to enforce it, and praying by reason thereof, either the specific performance of the agreement, or that by the usual proceeding by sale of the land, the lien of the appellees as vendors, might be enforced in equity.

The testimony taken under an interlocutory decree, discloses the embarrassed pecuniary condition of the appellant in the early part of the year 1848, when the first instalment became due; that he was at that time importuned and pressed by claims made upon him by other creditors, which he was unable to satisfy; indicating clearly that he had not then means or property sufficient to pay all his liabilities. The question is, whether under such circumstances, the appellees were bound to resort to the remedy at law, before they could invoke the aid of a court of chancery to enforce the equitable lien which the parties themselves contemplated; and which the appellant has evaded by his refusal to perfect the agreement, and execute the mortgage as stipulated between them?

If the mortgage provided for in the contract, and which was

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prepared and tendered to the appellant for his signature, had been executed and delivered, the rights of the appellees upon breach of condition, to resort to their equitable remedy upon it, could not be questioned. Ought it then to avail the appellant to insist that his neglect or his refusal to do what he was bound to do, must drive the vendor to another and a more circuitous remedy than the one agreed upon, and expressly within the view of the parties themselves? This failure on his part, would alone justify the resort of the appellees to the remedy selected by them, and relieve the case from the course of proceeding, which it is insisted they were bound to adopt, before the relief could be granted which they are now seeking in equity. Under any aspect of the case, however, it was not incumbent on them to seek their remedy first in a court of law; because it is manifest from the testimony, such remedy would not have proved adequate and complete, and their case is fully covered by the doctrine of this court in 12 *G. & J.*, 479.

The appellees being thus properly in a court of equity, has the appellant any claim to suspend the action of that court in enforcing the vendor's lien?

In referring to the contract, it will be seen that the land was not sold at a stipulated price per acre, but for a sum in gross, and is described as "a farm or tract of land called *Mother's Care*, containing one hundred and seventy-three acres, more or less." It is the farm or tract of land which is sold in terms as an entirety, and the contract is not predicated of the quantity of land. It is true, the vendor when questioned as to the number of acres, told the vendee that he had heard his brother say the old plot called for one hundred and seventy-three acres; but he did not himself know the quantity, never having seen it surveyed. Upon this statement, it is alleged that the land was sold in reference to this plot, and that it constitutes a representation of quantity. This explanation with regard to the number of acres, and his means of stating it, disclosed at the same time to the appellant, can, by no fair construction, be considered such a representation as would make it inequitable to compel the performance of the appellant's part of the con-

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tract. It is not pretended that he did *not* hear his brother say so. But the argument is, that this representation was of the essence and part of the contract; and being so, the large discrepancy between the quantity sold and quantity contracted for, ought to suspend the decree of the court, and let in the claim of the appellant to be allowed for deficiency.

The proposition might have some weight if we could regard this as a representation on the part of the vendor. But he expressly stated that he did not know the number of acres, except from what another had told him; which might or might not be true, but for which he did not intend to make himself responsible. And to avoid any such inference or construction, it is expressly stated in the contract that the tract contains that quantity of acres, *more or less*, for which a gross sum was stipulated to be paid. In the absence of any fraud, and none is pretended or alleged, these words must be considered as qualifying the representation of quantity, and neither party could claim relief, either on account of a deficiency or a surplus. Such is the doctrine of this court in *Jones vs. Plater*, 2 Gill, 125, and in the absence of any specific representation of quantity, except as stated in the contract, from which it manifestly appears that the land was not sold by the acre, a court of equity cannot be invoked to allow for deficiency. Neither fraud, nor wilful concealment, or misrepresentation on the part of the vendor appears on the record, and the contract must be considered a sale of the land for the specified sum, in which the words “more or less,” are intended to negative any representation of quantity. And the appellant having failed to comply with his stipulations for the payment, the decree of the chancellor was correct, and must be affirmed, and the case remanded.

DECREE AFFIRMED.

Baylies and Tyson, vs. Ellicott.—1851.

NICHOLAS BAYLIES AND JAMES E. TYSON, vs. PHILIP T.
ELLICOTT.—June 1851.

It is the policy of the insolvent laws of this State to require nothing more from insolvent debtors than an honest and full surrender of their estates for the benefit of their creditors, to entitle them to a personal discharge from their debts.

A debtor applied, on the 2nd of July, 1850, to a justice of the orphans court of *Howard* district, for the benefit of the insolvent laws. He had resided in *Howard* district for twelve months immediately preceding his application, but for the residue of the two years had resided in *Baltimore* city. He presented with his petition a certificate of the clerk of *Howard* district, that he had not, within two years, applied for the benefit of the insolvent laws of the State, but did not present a similar certificate from the clerk of *Baltimore* county. He received his personal discharge, and failing to give notice to his creditors, as required by the order of the justice, on the 20th of December, 1850, *Howard* district court, before whom said order required him to appear, ordered the time of publication to be extended.

HELD:

That the defects, if any, in these proceedings, are cured by the 2nd sections of the act of 1844, ch. 304, and of the act of 1836, ch. 293.

The act of 1849, ch. 88, granting appeals to this court, in cases of insolvent proceedings, applies to *Howard* district court, as well as to the county courts. This act is a remedial law, and is to be liberally construed.

The law creating *Howard* district court, invested it with all the powers and jurisdiction of the county courts, and in all acts of Assembly passed since, touching the powers and jurisdiction of county courts, this court is to be regarded as included, unless excluded in terms.

Appeal from *Howard District* court.

On the 2nd of July, 1850, the appellee presented his petition to *McLane Brown*, a justice of the orphans court of *Howard* district, for the benefit of the insolvent laws. The justice granted him a personal discharge, appointed him to appear before *Howard* district court, to answer all allegations made against him, and directed him to give notice to his creditors, by inserting a copy of the order of the justice in the *Howard Gazette*, once a week, for three consecutive months before said day, to appear in said court on that day, and show cause, &c. The proceedings were, on the same day, filed with the clerk of *Howard* district. On the day appointed, the

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appellants, creditors of the petitioner, appeared, and moved the court to dismiss the petition, which motion the court overruled, and the appellants appealed. The grounds on which the motion was made, and all the facts of the case, are fully stated in the opinion of this court. The appellee made a motion to dismiss the appeal.

The cause was argued before SPENCE, MARTIN and FRICK, J.

By ALEXANDER and NELSON for the appellants, and
J. T. B. DORSEY and R. JOHNSON for the appellee.

SPENCE, J., delivered the opinion of this court.

This is an application by the appellee for the benefit of the insolvent law of the State of *Maryland*. The appeal is taken from an order of *Howard* district court, overruling a motion on the part of appellants to dismiss the petition, for the following reasons:—"1st. That it does not appear that notice has been given to the creditors, &c., as directed by the order which was passed on the application." "2nd. That the petitioner did not present with his application a certificate from the clerk of the county wherein he resided for the space of two years next before his said application; that he had not applied for the benefit of the act for the relief of sundry insolvent debtors, and its supplements, within two years next before the date of his application." "3rd. That the petitioner resided in the city of Baltimore within two years next before the date of this application, and did not present to the justice of the orphans court a certificate of the clerk of *Baltimore* county; that he had not applied for the benefit of the act for the relief of sundry insolvent debtors, and its supplements, within two years next before the date of his application."

On the part of the petitioner it was shown, "1st. That *Howard* district court was in session on the 30th December, 1850."

2nd. That on the same day the following paper was filed with the clerk of the court; "*Samuel Ellicott* and *Philip T.*

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Ellicott, insolvent petitioners. *Mr. Worthington* enlarge the time of publication of notice to creditors, *Thomas B. Dorsey*."

And that the following docket entry was thereupon made: "Time of publication extended to September term, 1851, order filed."

It was admitted by the parties, that the petitioner, at the date of his application, and for twelve months next before that date, had resided in *Howard* district, and for twelve months next before that term, he had resided in the city of *Baltimore*.

The record shows, that the petitioner, at the time he made his application to the justice of the orphans court, for his personal discharge, presented the certificate of the clerk of *Howard* district court, that he had not, within two years next preceding his application, applied for the benefit of the insolvent laws of *Maryland*.

The counsel for the appellants, in their argument, assume the following positions:—"1st. That as the petitioner, during part of the two years next preceding his application, resided in the city of *Baltimore*, he ought, at the time of his application, and as parcel thereof, to have presented to the justice of the orphans court, a certificate from the clerk of *Baltimore* county court, that he had not, within two years next preceding the date of his present application, made a similar application within the city of *Baltimore*." "2nd. That the failure of the petitioner to give notice to his creditors, as directed by the justice, forfeited his right to a discharge. That *Howard* district court, in December, 1850, had no authority to extend the time for appearance, or giving notice to creditors; and if it possessed any such authority, did not validly exercise the same."

It is the policy of the insolvent law of *Maryland*, as clearly shown by the provisions of her statutes, to require nothing more from insolvent debtors, than an honest and full surrender of their estates for the benefit of their creditors, to entitle them to a personal discharge from their debts.

We should, in this case, be greatly at fault, satisfactorily to

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answer the able and ingenious argument of the appellants' counsel, on the objections made by them to the ruling of the court in this case, were it not that we consider the acts of Assembly of 1844, ch. 304, and of 1836, ch. 293, furnish a full and conclusive answer to their objections.

It is difficult to imagine what language the legislature could have employed to cure defects in proceedings of this description, broader or more unmeasured than they have employed in the second section of the act of 1844, ch. 304. "That all defects in any proceedings now pending, or hereafter to be instituted," "may be cured at any time before the final action of the county courts," "as if the whole subject be taken up *de novo*, so as to enable the applicant to comply fully with the several requisitions of the act to which this is a supplement, and its various supplements."

The act of 1836, ch. 293, sec. 2, makes as ample provision, by investing the courts with full power in their discretion, "in all cases" to extend the time of publication of notice to creditors.

The motion to dismiss the appeal in this case, is upon the ground, that the act of 1849, ch. 88, restricts appeals to cases of insolvent proceedings pending in the county courts, to the exclusion of *Howard* district court. Would it be just to impute to the legislature the intention to exclude the people of *Howard* district from the important right of appeal in this class of cases, which they had secured to all the other citizens of the State? The law which creates this District constitutes the judges of the third judicial district the judges of that court, and invests them with all the jurisdiction of the county courts of the State.

In the acts of Assembly, since the origin of this District, touching the powers and jurisdiction of the county courts of the State, it is sometimes included in terms, sometimes omitted. But that this court was to have all the powers and jurisdiction of the county courts, unless excluded in terms, cannot be questioned. If this be not the true construction, whence the jurisdiction of this court to entertain appeals from judgments rendered by justices of the peace? How do insolvent cases come

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within their jurisdiction, as the law directs their applications to be sent by a judge of the orphans court to the county court? The petitioner is to present the certificate of the clerk of the county court, when literally speaking, there is no such official. The act of 1849, is a remedial law, and to give it the partial construction contended for, would be a violation of all the rules usually resorted to in the interpretation of such statutes.

We concur in the opinion of the court below, overruling the motion to dismiss the petition, and the case is remanded for further proceedings.

CASE REMANDED.

ISAAC GLASS AND OTHERS, vs. ISAAC RAMSEY AND HUGH JENKINS.—June 1851.

The finding of a jury upon the trial of issues framed upon a *caveat* to a will, is conclusive, with respect to all questions touching the validity of the will.

But when such a verdict is introduced to defeat a claim by the executors, for costs and expenses incurred in resisting the *caveat*, upon the ground that it imputed fraud to the executors in the procurement of the will, it is collaterally introduced, and is open to examination.

After probate of a will and grant of letters testamentary, counsel fees and costs will be allowed to the executors for resisting a *caveat* to the will, and such executors will also be allowed their commissions.

APPEAL from the orphans court of *Baltimore* county.

The will of *George Hutson*, deceased, was admitted to probate, and letters testamentary granted to the appellees, named therein as executors. Afterwards, a *caveat* was filed by the appellants, praying that the probate of this will might be revoked and the will set aside. Certain issues were then framed and sent to *Baltimore* county court for trial, and among others,

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the following. The appellees were the defendants in the trial of these issues:

4th. “Whether the executors of said paper or instrument of writing, by the said *George Hutson*, was procured by fraud or fraudulent misrepresentation by the defendants, or either of them, or by others acting with their privity or by their direction.”

The jury found a verdict for the caveators on all the issues, and on appeal, the judgment of the county court pronounced upon this verdict was affirmed, (see *ante* 56,) by this court. Thereupon, the orphans court, on the 4th of June, 1850, passed an order, revoking the probate of the will, the grant of letters testamentary to the appellees, and granting letters of administration, on the personal estate of the deceased, to a brother of the deceased.

The executors, the appellees, then exhibited an administration account, in which they claim an allowance for counsel fees, costs and expenses incurred by them in resisting the *caveat* to the will, and also their commissions of five *per cent*. The balance of the personal estate, amounting to \$17,287.35, they paid over to the administrator, who executed a receipt and release therefor. The appellants filed exceptions to the allowance of the several items of this account, embracing said counsel fees, costs, expenses and commissions.

Depositions were then taken and filed in the cause, showing that the charges for counsel fees were moderate and reasonable, and clearly exonerating *Hugh Jenkins*, one of the said executors from any fraud or practice of any kind touching said will; and showing that he knew nothing of the execution or the existence thereof, until after the death of the testator, *George Hutson*. It was agreed, that these depositions should be admitted upon the questions relating to the accounts of the executors, “subject, nevertheless, to objections on the ground of inadmissibility.” Further evidence was also taken, showing that said executors had duly given bond, and proceeded faithfully in the discharge of their duties as executors, selling under the

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order of the orphans court certain leasehold property of the deceased, &c.

Upon this testimony the orphans court, on the 8th of October, 1850, being of opinion that the said executors are entitled to an allowance out of the estate for all costs and expenses properly incurred by them in resisting said *caveat*, as well in said orphans court as in *Baltimore* county court, and the Court of Appeals, passed an order allowing said claims, as stated in their account, and also the commissions claimed by them. From this order the appellants appealed.

The cause was argued before DORSEY, C. J., SPENCE, MARTIN and FRICK, J.

KILBOURN and MAULSBY for the appellants, insisted upon a reversal of the order.

1st. Because the finding of the jury in the trial of the *caveat*, is conclusive evidence of the facts therein contained, and no evidence is admissible to invalidate or contradict it.

2nd. The participation of the appellees in the fraudulent procurement of the said will, bars them, in law and equity, from claiming and receiving compensation for their expenses in employing counsel to defend the same, and from any other expenses consequent upon their defending and attempting to establish the same, and from all claim for commissions as executors.

NELSON for the appellants, contended for an affirmance.

Because the counsel fees and expenses allowed by said order, were incurred by the appellees in the discharge of their duties as executors, and were properly chargeable upon the estate.

MARTIN, J., delivered the opinion of this court.

By the agreement of counsel in this case, it is stipulated, that the depositions filed in the proceeding before the orphans court, shall be made a part of that proceeding, subject to all objections

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on the ground of admissibility, and from the points filed by the counsel for the appellants, we find, that the only exception taken to the admissibility of these depositions is, that they cannot be introduced to establish or contradict the finding of the jury in the trial of the *caveat*, in which the verdict imputes to both the appellees the fraudulent procurement of the paper purporting to be the last will and testament of *George Hutson*, out of whose estate compensation is now claimed by them for costs and expenses in employing counsel to resist the *caveat*.

It is certainly true, that this finding of the jury is to be treated as conclusive, with respect to all questions touching the validity of the will. The case of *Reed vs. Jackson*, 1 *East.*, 355, cited by the counsel for the appellants, sustains this proposition. But when upon a new and different issue, founded on a claim for costs and expenses incurred by the appellees in the discharge of the duties imposed upon them as executors by the letters testamentary, the finding of the jury upon the *caveat* is collaterally introduced, to affect the propriety or legality of such claims, it is like all other evidence of that character, open to explanation. And taking the depositions furnished by the counsel of the *caveators*, or the trial before the orphans court, into consideration, the conduct of *Hugh Jenkins*, one of the executors, is relieved from all imputation of fraud, so that the order of the orphans court, allowing to the appellees, counsel fees and costs, is covered by the opinion of this court in the case of *Compton vs. Barnes*, 4 *Gill*, 55.

There is no ground for disputing the correctness of the order of the orphans court allowing to the appellees their commissions. These were allowed for services actually rendered to the estate, by the appellees, as executors, and the propriety of this order also, is fully vindicated by the case of *McKim and Marriott, vs. Duncan*, 4 *Gill*, 72.

The order of the orphans court is therefore affirmed.

ORDER AFFIRMED

Cook vs. Duvall.—1851.

SEPTIMUS J. COOK vs. CHARLES DUVALL.—June 1851.

A prayer "that the jury must, upon the evidence if believed by them, find a verdict for the defendant," is too general. It does not disclose a specific point or proposition of law, to which the attention of the court was invited, and the decision of which would appear by the record on appeal to this court. This the policy and spirit, as well as the letter of the act of 1825, ch. 117, requires.

Where a party bound in a particular character to pay a debt, makes a promise to pay it, that promise does not enlarge the obligation so as to make him responsible in another right or character than that in which he was originally bound.

But if a man be indebted in *autre droit*, and in consideration of *forbearance*, to be granted him, assumes payment of such debt, he may bind himself *proprio jure*.

A debt due by the wife before marriage, was presented to the husband during coverture, who promised to pay it "if the plaintiff would wait a few days."

HELD: That the plaintiff could recover against the husband on this promise, though the wife died before he brought his action.

APPEAL from Prince George's county court.

This was an action of *assumpsit* by the appellee against the appellant, to recover the amount of a medical account. Plea, *non-assumpsit* and issue. The services were rendered to *Juliet McGill*, her children and servants, whilst she was a *feme sole*.

EXCEPTION. The plaintiff offered in evidence his account, and then proved that the defendant intermarried with the said *Juliet*, after the accruing of said account against her, and further proved that during the coverture, the witness, at the request of the plaintiff, presented the account to the defendant for payment, who replied, that "he would settle the account, that he had no money at the time, and requested witness to say to the plaintiff, that if he would wait a few days, he would come to his, plaintiff's, house, and settle the account." The defendant then proved that said *Juliet* died before the institution of this suit, and prayed the court to instruct the jury that upon the foregoing evidence, if believed by them, they must find a verdict for the defendant, which the court, (CRAIN, A. J.,) refus-

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ed to give, but instructed the jury that if they find that defendant, during the coverture, promised to pay the said account, "if the plaintiff would wait a few days," then they must find for the plaintiff, notwithstanding they may find that the defendant survived his wife, the said *Juliet*. Defendant excepted to the refusal to grant his prayer, and to the instruction as given, and the verdict and judgment being against him, he appealed.

The cause was argued before DORSEY, C. J., CHAMBERS, MARTIN and FRICK, J.

THOMAS F. BOWIE, for the appellant, contended that the court erred in its opinion, because upon the death of the wife, the account being against her, no right of action against the husband existed, notwithstanding an express promise to pay.

TUCK, for the appellee, insisted: 1st. That the prayer of the appellant was too general in its terms, and therefore properly rejected. 2nd. That the court were right in refusing said prayer; and in the instruction given, because the promise of the appellant to pay the account, entitled the appellee to a verdict, although the suit was instituted after the death of the wife.

CHAMBERS, J. delivered the opinion of this court.

The prayer of the defendant below was properly rejected by the court. Its general character did not disclose a specific point or proposition of law, to which the attention of the court was invited, and the decision of which would appear by the record on appeal to this court. This the policy and spirit, as well as the letter of the act of 1825, ch. 117, requires.

It was also properly rejected if the point ruled by the court in the instruction actually given, was rightly decided, and we think it was so.

The court place the case, not upon any obligation of the defendant arising out of his condition as the survivor of his wife, nor upon the fact that he had in general terms assumed the payment of the debt originally due from his wife.

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It is certainly true, that where an individual being legally bound in a particular character to pay a debt, makes a promise to pay it, that promise does not enlarge the obligation by making him responsible in any other right or character than that in which he was originally bound. But it is equally true that if a man be indebted in *autre droit*, and in consideration of "forbearance," to be granted to him, assume payment of that debt, he may bind himself *proprio jure*. If when the defendant in this case was called upon for the payment of the account then due from him *jure uxoris*, he had expressed his readiness and willingness, and his intention to pay, the law would have regarded it as simply a recognition of his existing liability, and a promise to discharge it, without varying or enlarging the extent of his liability. But he did more, he proposed terms, upon which he assumed absolutely to pay. Such at least was the allegation, and proof had been offered for the purpose of sustaining it.

The law on this subject is well laid down by the *Lord Chief Baron Skynner*, speaking for the judges before the House of Lords, in the case of *Rann vs. Hughes*, 7 Term Rep., 350.

It has been objected in the argument here, that the evidence of "forbearance," as the foundation of the promise was not sufficient. It had gone to the jury and without objection, and its sufficiency was a question for them. The language of the exception is loose and not very technical in stating the decision of the court, but we take the state of the facts to be, that the plaintiff had offered proof of the indebtedness of the wife before marriage, and of the marriage and promise as laid in the 4th count of the *nar*, and that the plaintiff did forbear to sue until two years and a half thereafter, as appeared by the writ. All the proof offered was assumed by the defendant's motion to be true, and when upon this assumption the court was asked to say the plaintiff could not sustain the suit, they say in effect, if the jury believe that the defendant assumed to pay the plaintiff in consideration of forbearance, promised and granted, then the death of the defendant's wife would not prevent the plaintiff from recovering. With regard to the character of forbear-

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ance, the case of *Guy vs. Tams*, 6 Gill, 82, is a stronger case than the one before us.

JUDGMENT AFFIRMED WITH COSTS.

JOHN H. OWINGS vs. ELIZA BATES.—June 1851.

An intestate died leaving a brother and three sisters. The eldest sister, who was also older than the brother, was unmarried. The other sisters were married. **HELD:** That the eldest sister was entitled to administration upon the estate, and could only be excluded upon the representation or impression of an indefinite absence from the State.

The husband of one of the unmarried sisters has no right to supersede the eldest sister in her rightful claim to the administration, without the consent, or without notice, to the other parties.

Where a distributee stands in the relation both of debtor and creditor to the estate, and there are other parties who are entitled to administer, it would be derogatory to sound principles of justice to commit the administration of the estate to him.

It was agreed at an interview between all the distributees, that the eldest sister, the one entitled to administration, should administer the estate, the husband of one of the younger sisters being at the time present, and disclaiming all right or intention to apply for the administration. On the 26th of December, the eldest sister left the State on a temporary sojourn in the *District of Columbia*, with the intention expressed and understood, of returning within the ensuing month, to apply for the administration. On the 6th of January following, the said husband of the younger sister, without notice to, or consent, of the other parties, applied for and obtained the administration. **HELD:** That under these circumstances the grant of letters to him was premature and improvident, and should be revoked.

APPEAL from the Orphans court of *Howard District*.

This appeal was taken from an order of the Orphans court revoking letters of administration granted to the appellant, upon the estate of *Mrs. Ann M. Miller*, who died intestate leaving three sisters and one brother. The appellee is the

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oldest sister, being also older than her brother, and the appellant is the husband of one of the younger sisters.

The nature of the controversy fully appears from the petition of the appellee asking a revocation of the letters granted to the appellant, and the answer thereto. This petition was filed on the 29th of January 1850, stating, among other things, that petitioner was a resident of *Baltimore* city, that she was the eldest sister and one of the heirs of the intestate, that one of the younger sisters was the wife of the appellant; that after the intestate's death, a meeting of the heirs was held at the house of the appellant, when it was agreed by the heirs and by the appellant on the part of his wife, that the appellee should assume the administration of the deceased sister's estate; that in accordance with this arrangement, the appellee was put in possession of the papers and personal effects of the intestate; but that when, after a short absence, she came to apply for letters of administration, she discovered that the appellant, taking advantage of her absence, had, in violation of the agreement entered into by the heirs, and against their wishes and consent, applied for and obtained administration upon the intestate's estate. She further represented, that the appellant had no legal right to administer to her exclusion; and moreover, that there was great impropriety in his so doing, from the fact, that he was largely indebted to the estate, which consisted principally, if not wholly, of a large sum of money, then, and for a long time previous in the hands of the appellant; and that there were considerable matters of account between him and the estate, the settlement of which, in any legal or equitable manner, would be impracticable, so long as the appellant was clothed with the character of administrator. She therefore prayed that the appellant's letters of administration might be revoked.

The appellant, by his answers denied that at the time of his obtaining letters of administration, the appellee's residence was in the city of *Baltimore*, and alleged that for some years previous, and at the time of filing his answer, she had resided, and did then reside, out of the State of *Maryland*, and that

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she was therefore not entitled to be regarded in the granting of letters of administration, unless she had actually applied for them.

He denied the alleged agreement among the heirs, and asserted that no binding obligation was entered into on his part; that he refused to administer, owing to his indignation at the course that had been pursued, and well knowing that if the appellee were to remain in the State, she might at any time present her prior claim; that by declining to accept the administration, he never intended to waive any right he might have with regard to it; nor did he believe, had he assented to administer, that the appellee would have given her consent. He admitted that the appellee had possession of the personal effects of the intestate, but alleged that she came improperly by them. He further denied his indebtedness to the estate, but insisted that the estate was indebted to him, and prayed that the appellee might be dismissed with costs.

Testimony was then taken the purport of which will be found in the opinion of this court. The orphans court ordered the letters to be revoked and from this order the appellant appealed.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MARTIN and FRICK, J.

By R. J. BRENT, for the appellant, and

By R. JOHNSON, JR., and WALLIS, for the appellee.

FRICK, J., delivered the opinion of this court.

The controversy here between the parties involves the right to the administration of an intestate's estate. The deceased left three sisters and one brother. The sisters, all except the appellee, were married, one of them being the wife of the appellant. The record shows, that it was agreed at an interview between all the parties, that the appellee, as the eldest distributee, should administer the estate, the appellant being at the time present and disclaiming all right or intention to apply for the administration. The whole estate of the intestate

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is comprized in a promissory note for \$1636, drawn by the appellant himself in favor of the intestate. The note having some years to mature, and there being no urgent necessity to hasten the administration, the appellee left the State upon a temporary sojourn in the *District of Columbia*. Her purpose to return and apply for the administration was expressed and understood before she departed on the 26th of December, and was reiterated by her letter of the 28th of the same month, to the appellant's wife, in which she affirms the intention of returning with that view in the course of the ensuing month. But upon the 6th of January following, the appellant applied to the Orphans court of *Howard District of Anne Arundel* county, and without any knowledge of the agreement, or of the claim of the other party, the court upon his application granted the letters of administration to the appellant.

Upon this state of facts, upon petition of the appellee representing the violation by the appellant of the agreement entered into by the heirs, and the action of this appellant in the matter against the consent and wishes of the parties, (which is signified by their protest in the proceedings,) and insisting upon the incompatibility of confiding to the only debtor of the estate, the administration of the assets, the orphans court revoked the letters sued out by the appellant, and the administration was committed to the appellee. From this order thus revoking his administration, the appeal is taken to this court.

It is true, that the appellant in his answer insists that the estate is indebted to him. But when the record discloses that his claim is for the board of the deceased from the year 1828 to the period of her death, and that his note for a large sum of money in her favor is but of recent date, (the 15th of November 1848,) the case presents an aspect, which in the attitude both of debtor and creditor to the estate, renders it highly derogatory to sound principles of justice, that the adjustment should be committed to the party who stands in that relation to the other parties interested in the assets.

We must assume that, with a knowledge of this state of things, the orphans court would have declined to confide this

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administration to the appellant, independent of the agreement to which he was at least a witness, if not a party, by his disclaimer. But without any such agreement the appellee was the party entitled to this administration, and could only have been excluded, upon the representation or impression of an indefinite absence from the State. Such however was not the fact, as is indicated by her immediate return in the same month of January; and under all these circumstances the grant of letters to the appellant was premature and improvident. Without the consent or without notice to the other parties, the application ought not to have been made, for without this the appellant was not entitled to supersede the appellee in her rightful claim to the administration. And when with a full exposition of all the facts, the orphans court have afterwards deliberately revoked their original grant of these letters and placed the administration in the hands of the party legally entitled in preference to the appellant, we do not feel authorised or disposed to disturb their decree, which is therefore affirmed.

DECREE AFFIRMED.

WILLIAM WELLING vs. EDWARD H. OWINGS AND OTHERS.
June 1851.

The true construction of the 2nd section of the act of 1810, ch. 34, relating to nuncupative wills, requires, that the testamentary words, or the substance thereof, should be reduced to writing, within six days after they were uttered and shown to and approved of, as correct, by *each* of the attesting witnesses.

The word "testimony," used in this section, applies to the nuncupation itself, and not to the prerequisites required by the 1st section, which may be established at any time before the paper is admitted to probate.

The testamentary words must be reduced to writing, and seen by, and found to be correct, by *each* of the attesting witnesses, within the period limited by the 2nd section of this act.

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Where testamentary words were reduced to writing by one of the witnesses, and shown by him to another, within the time prescribed by the act, but were not reduced to writing by the third witness, nor seen by him until more than twelve months after the testator's death. **Held:** That such words could not be admitted to probate.

APPEAL from the orphans court of *Baltimore* county.

This is an appeal from an order of the orphans court, admitting to probate testamentary words purporting to be the nuncupative will of *Richard H. Owings*, deceased, reduced to writing by *Basil Owings*, the father of the deceased, and one of the attesting witnesses, as follows:

“On the 29th day of August, 1849, *Richard H. Owings*, of the city of *Baltimore*, called on *Mr. Taylor*, *Mrs. Mills*, and myself, to witness his will, which he declared to be as follows: ‘I leave all that I am worth to my mother, to be divided between my brothers and sisters.’ As witness my hand, this 31st day of August, 1849. **BASIL OWINGS.**”

This will was offered for probate, on the 7th of November, 1850, and a *caveat* was filed thereto by the appellant, one of the creditors of *Basil Owings*, the father of the deceased, said *Basil* having applied for the benefit of the insolvent laws prior to the death of his son. This *caveat* was answered by the appellees, the brothers and sisters of the deceased, and the depositions of *Basil Owings*, *Elizabeth Mills* and *John H. Taylor*, the three attesting witnesses above referred to, were taken, establishing the following facts: That the witnesses were called upon by the deceased, at the time he spoke the words, to witness his will. That the words were spoken by the deceased in his last illness, the day before his death, at the house of *Hezekiah Magruder*, of the city of *Baltimore*, where the deceased resided for more than ten days next previous to his decease, and were reduced to writing by said *Basil Owings*, about two hours after his son's death. That said *Basil* showed the writing to *Mrs. Mills* immediately thereafter, who read and approved of the same. That *Mr. Taylor*, the other witness, never saw the paper until about December 1850, and never reduced the same to writing at all. This witness, how-

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ever, swore that the words in the paper were the words spoken by the deceased, as stated by the other witnesses. The estate of the deceased was admitted to amount to, at least, \$400.

On this testimony the orphans court passed an order, admitting the same to probate, from which the caveator, *Welling*, appealed.

The first section of the act of 1810, ch. 34, is as follows:

“ *Be it enacted*, that no nuncupative will, hereafter to be made, shall be good, where the estate thereby bequeathed shall exceed the value of \$300, that is not proved by the oaths of three witnesses at least, who were present at the making thereof; nor unless it be proved, that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she had been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he or she returned to the place of his or her dwelling.” The second section is quoted at length in the opinion of this court.

The cause was argued before DORSEY, C. J., SPENCE, MARTIN and FRICK, J.

WM. H. G. DORSEY for the appellants, insisted upon a reversal of the order.

1st. Because the paper writing was not exhibited to one of the witnesses until after six months had elapsed from the death of *Richard H. Owings*.

2nd. Because the testimony of the witnesses was not committed to writing within six months after the speaking of the pretended testamentary words.

CHAS. H. PITTS for the appellee, contended there was no error in the decree of the orphans court.

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Because the act of Assembly, in relation to nuncupative wills, was substantially complied with, as the testamentary words were reduced to writing within six days after the death of the testator, and were proved by three witnesses.

MARTIN, J., delivered the opinion of this court.

As in this case it has been conceded that all the facts necessary to impart validity to a nuncupative will, as required by the *first* section of the act of Assembly of 1810, ch. 34, existed, the correctness of the order of the orphans court in admitting to probate the paper now in contestation depends exclusively upon the interpretation of the second section of that statute.

That section is in the following words:—

“That six months after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof were committed to writing within six days after the making of the said will,” and in a case like the one before us, the true construction of this section requires, we think, that the testamentary words, or the substance thereof, should be reduced to writing within six days after they were uttered, and shown to, and approved of as correct by *each* of the attesting witnesses. It is well known that testaments of this character are, from their nature, not only open to fraud and fabrication, but peculiarly exposed to mistakes in relation to the testator’s intention on account of the imperfection and frailty of human memory. And it is manifest, that the legislature in legalizing these nuncupative wills, intended to guard the testator against imposition and to protect him from mistakes, by requiring that these testaments should in point of accuracy, approximate as near as possible to written wills, and they believed that this purpose would be only accomplished by demanding that the testamentary words, as uttered, should be written down and seen and recognised as correct by each of the three attesting witnesses, while the language of the testator was fresh in their recollection.

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The word “testimony” as used in this section, applies, we think, to the nuncupation itself, and not to the prerequisites required by the *first* section of the statute, as that the will was made in the last sickness of the testator, and in the house of his habitation. These certainly are material facts with respect to the predicament of a person making a nuncupative will, and must be clearly proved. But they are facts which may be established at any time before the paper is admitted to probate, and need not be proved by the attesting witnesses. No useful purpose could be gained by requiring testimony of this kind to be reduced to writing within six days after the will was made. The provision with regard to the testamentary words, stands however upon a very different ground. It is obvious that accuracy and precision in reference to the words used by the testator, is of the greatest importance, as his intention with respect to the disposition of his estate can only be known from the language he may have employed to communicate his meaning. And that accuracy might be secured, so far as practicable, in reference to the words used by the testator, we understand the legislature to have required that these testamentary words, or the substance of them, should be reduced to writing, and should be seen by, and found to be correct, by each of the three attesting witnesses, within the period limited by the second section of the statute.

It follows from the construction we have thus placed on the second section of the act of Assembly of 1810, ch. 34, that the decree of the orphans court admitting this paper to probate is erroneous and must be reversed. For it appears from the record, that although the pretended testamentary words were reduced to writing by one of the witnesses, and shown by him to another, within the time prescribed by the act, yet they were never reduced to writing by *Taylor*, the third witness, and were not seen by him until more than twelve months after the testator’s death.

The order of the orphans court is reversed with costs.

ORDER REVERSED WITH COSTS.

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JEREMIAH T. SPEIGHTS vs. WILLIAM PETERS.—June 1851.

It must be a strong case that will justify the appointment of a receiver. The court never exercises this power where it is likely to produce irreparable injustice, or injury to private rights, or where there exists any other safe or expedient remedy.

But in many instances, especially in partnership transactions, where, after dissolution, the parties cannot agree upon an adjustment, and the funds are in the hands of one partner alone, cases must arise for the appointment of a receiver.

Two parties agreed as joint owners of a vessel to carry freight from *Baltimore* to *San Francisco*, and a portion of the cargo was also a joint concern. The partnership was dissolved by a sale of the vessel at the latter place, and one of the partners then filed a bill for an adjustment of accounts, charging that large proceeds of the adventure were remitted to *A. & Co. of Baltimore*, in whose hands they now are, and avers that they will be lost to the concern if permitted again to come to the hands of the defendant. The answer denies that these funds belong to the concern, but are defendant's own private property. **HOLD:** As a final adjustment between the parties of all accounts relating to the concern, can alone determine the rightful ownership of these funds, it is proper that a receiver should be appointed, and continued until such adjustment is made.

It is not always a necessary condition to the appointment of a receiver, that the court should be satisfied that the property is in imminent peril. Where the fund is *prima facie*, the proceeds of a partnership, it is but a provident exercise of equity power to place it under the care of the court.

If one partner in the ordinary course of trade, seeks to exclude another from taking that part in the concern which he is entitled to take, the court will grant a receiver.

After dissolution has taken place, or is intended, if one partner acts against the interest of the others, or carries on trade with the partnership funds on his own account, or in any other manner excludes his copartner from that share to which he is entitled in winding up the concern, equity will appoint a receiver.

Against the legal title, or a strong presumptive title in the defendant, the court interferes with great reluctance, and only where the property is in danger of being materially injured.

APPEAL from the equity side of *Baltimore* county court.

The bill in this case was filed by the appellee, the complainant, against the appellant, as defendant, on the 16th of December, 1850, for an account, and the appointment of a receiver.

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It alleges that complainant and defendants were joint owners of the barque *Tarquin*, complainant owning three-fourths, and defendant one-fourth, for which he had paid in cash, \$200, and gave his note, now held by complainant, for \$1487.40, the balance of his one-fourth. It was agreed that the vessel should be sent to *San Francisco*, on joint account, and that defendant should go on her as master and consignee. It was further agreed that the complainant should make no charge for his services about the business of the barque in *Baltimore*, and the defendant none for such services as he might render abroad. On the 22nd of January, 1851, the barque sailed under defendant's command, with a freight list of upwards of \$10,574, and arrived safely at *San Francisco*, where defendant received on account of freights, \$6047.72. It further charges, that defendant finding he could make money by the barque, and before her cargo was discharged, put her up for sale, and became the purchaser of her for the nominal sum \$1750, after which he sold her for \$3500, or more, to persons unknown, and now claims the benefit of that sale for himself. That this transaction was unauthorised by the complainant, but defendant received the money, and with it and the freights, went on speculating, and made large profits, so that instead of remitting to and accounting with complainant, he has returned home with some \$10,000, for the larger part of which he is indebted to complainant. A portion of this money, the bill alleges, is in the hands of *Adams & Co.*, and others, which will be lost if it goes again into the hands of defendant. The bill then further avers that the adventure being a joint one, and defendant having so conducted himself fraudulently, a receiver ought to be appointed to take possession of the funds, in controversy, till the accounts be settled; that in such accounts, defendant ought to be charged with the value of the barque, as at \$8000, he well knowing an offer to that amount had been made for her. That defendant has refused to pay, and has rendered a false and fictitious account. The prayer is for an account, a receiver, and further relief, &c.

The court appointed a receiver, and defendant filed his an-

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swer on the 23d of December, 1850, in which he admits the joint ownership in the proportions alleged, and that complainant held his note, as stated, with interest, from January, 1850, secured by a mortgage of his interest in the vessel. He denies that he was to charge nothing for his attention to the business of the voyage in *California*. He says, the cargo was a general cargo, of which more than half was consigned to him by the owners, and the residue to other consignees, except a small part which went on the vessel's account, and of which he had the control. That the barque went to sea, with a freight list of \$10,326, a copy of which is filed, marked exhibit G. He alleges, that complainant received \$1000 passage money, and that \$1008.71 was lost on freight. He admits that he received \$5086.09 freight, in *San Francisco*, as per exhibit A, of which he alleges he furnished complainant a copy. \$5,208.20 freight, payable in *Baltimore*, were adjusted, he says, with complainant, as per exhibit B, of which he alleges he gave complainant a copy. He then alleges, that when he left *Baltimore*, he believed himself agent of the barque, with full control over her, but on arriving at *San Francisco*, he learned, with much surprise, that complainant had consigned her to *James Lippincott*, to whom he had executed a power of attorney to sell the whole of defendant's interest in her. That *Lippincott* had left *San Francisco*, and had left the sale of the vessel in the hands of a sub-attorney, but had appointed no consignee. That he, though mortified by such conduct from the complainant, went on, nevertheless, to do the best he could, and to facilitate the sale, authorised said sub-attorney to sell his one-fourth also, but denies that the sale was by his wish or procurement, and avers, that he only submitted, and unwillingly, to complainant's overruling orders. He attended the sale without intending to buy, and bought in the vessel at \$1,750, merely to save himself, and in good faith, and sold her for \$3,500 afterwards, merely by accident, to a party of miners. He denies that he speculated with the proceeds of the vessel, freights or cargo, and then makes a statement of payments he made on account thereof. That he paid over complainant's part of the proceeds of sale,

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as well as the amount of his own note of \$1,387.50, to the sub-attorney of *Lippincott*, which he believes complainant has received. He denies that he owes complainant anything, except \$104.59, of which he has made a legal tender, and avers that he has accounted fully and fairly. He admits funds in the hands of *Adams & Co.*, but denies that complainant has any thing to do with them, or that they would be in any danger in his hands. He denies fraud, &c., and says, he ought not to be charged with the money the barque sold for, and prays to be dismissed, and that the receiver be discharged.

A motion was then made, that the receiver be discharged, and affidavits and other testimony taken, the purport of which sufficiently appears in the opinion of this court.

The court below, (LE GRAND, J.,) overruled the motion to discharge the receiver, and from this order, as well as the order appointing the receiver, the defendant appealed.

The cause was argued before DORSEY C. J., SPENCE, MARTIN and FRICK, J.

By WM. J. WARD, and MAYER for the appellants, and
By WALLIS for the appellee.

FRICK, J., delivered the opinion of this court.

This appeal involves the propriety of appointing a receiver under the circumstances charged in the complainant's bill, and the refusal of the court upon motion of the defendant, (the present appellant) to discharge the receiver so appointed upon the answer and testimony subsequently filed in the cause.

It is difficult to approach this issue between the parties, without encroaching upon matters which are more appropriately the subject of consideration in the further progress of the cause. The accounts between them, are a part of the record before us, but of course they come under review here only incidentally as a basis for the relief sought in the appointment of a receiver. We desire carefully to abstain from the intimation of any opinion, which involves the correctness of these char-

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ges or the statements set up by either party, in support of the rights which they respectively claim, while we proceed in a review of the case presented, briefly to disclose the grounds on which we think the court below were fully justified in the course of proceeding adopted.

It is true, as it has been strenuously urged, that it must be a strong case, that will justify this ultimate resort of a court of equity. It is a high power never exercised, where it is likely to produce irreparable injustice or injury to private rights, or where there exists any other safe or expedient remedy. Still in a variety of instances, especially in partnership transactions where the parties after dissolution of their connection, cannot agree upon the adjustment, and the property or funds in dispute are in the hands of one partner alone, each having an equal right to the control of the property, cases must necessarily arise, where the interest of both can only be properly secured by the intervention and appointment of a receiver.

Is the case presented here one that warrants this interposition of a receiver between the parties? It originated in a joint adventure, in which the parties engaged as owners of a barque, to carry freight from *Baltimore* to *San Francisco* in *California*. The answer distinctly admits the joint ownership of the vessel, and that a portion of the cargo was also on joint concern of the parties, and the accounts filed in the cause as exhibits, present them as partners by the specific character of the adventure itself. The partnership was dissolved by the sale of the vessel at *San Francisco*; and the bill is now filed to obtain an adjustment of the accounts between them as a proper subject for the action of a court of equity.

The bill charges that a large amount of the proceeds of the adventure, was remitted by the appellant from *San Francisco*, and was placed in the hands of *Adams & Company*, and others of the city of *Baltimore*, where it remained at the time of filing the bill, and affirms the belief that if these proceeds come to the hands of the appellant, they will be lost to the concern. The answer admits that funds were so remitted, but that they belong to the appellant, and denies that if in his

hands they would be in any danger of being lost, or that the appellee has any claim to them.

Are these then the funds of this partnership, or rather the proceeds of this adventure? The complainant asserts that they are, the respondent claims them as his own private funds. But it can scarcely be doubted from the complexion of the whole case presented, that if so, they can only be his as the results of this adventure, and as such a portion of the proceeds. A final adjustment between the parties of all accounts relating to the concern, can only determine the rightful appropriation, and in the meantime, under the existing relation between the parties, to discharge the receiver and put these funds at the disposition of the appellant, would, we think, create just apprehension of danger to the rights of the other party.

We find, so far as the record discloses the means of the appellant, that he was limited in his resources at the commencement of the adventure. He paid but two hundred dollars on account of his one-fourth interest in the barque, and executed a note and mortgage to secure the balance. He was then in debt for the actual property, the proceeds of which are now in controversy. There is no proof or pretence that he owned or possessed any other funds or property, than what he derived from his part of the adventure. In one of his letters to the appellee, he represents himself as poor, and commends his family in his absence to the care and assistance of the appellee. Thus entirely without means of his own at the time of his departure, the first impression naturally suggests, that what he brought home with him or remitted from *San Francisco*, was altogether the proceeds of this joint adventure. We do not mean to say it will so result on the final investigation. For admitting the correctness of his accounts, the balance resulting would be adequate to account for the possession of funds on his private account. But the legality and justice of the claims in this account, to a very large amount, denied by the appellee, are the very points in controversy, and if not ultimately maintained, to that extent, remain the funds of the partnership. Indeed until the final decision between the parties,

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all the funds coming to the hands of the appellant as growing out of this adventure, must be so considered. And in the absence of all proof that the defendant possessed any private resources at *San Francisco*, and uncommitted as to the final result of these accounts, we are at least warranted, for the purpose of the present application to the court, in treating the fund in controversy as assets of the partnership.

Now, has the appellant committed any breach of contract or duty as a co-partner, which justifies the interference of this court? Without intimating any such positive violation of duty, as would anticipate the ulterior judgment of the court upon this charge of the bill, it is at least manifest, that in the transactions at *San Francisco*, he acted precipitately and under great excitement, which, however, we do not mean to say was without provocation. But, by his own admission, he assented to it, if he did not coerce a sacrifice of the vessel, which he himself asserts he could have sold at *Panama* for three times the sum obtained at *San Francisco*. He bought the vessel himself, and the agent of the complainant, in his testimony, charges him expressly with precipitating the sale before the cargo was discharged. The fair character of the purchase, and the price paid, seems to be fully sustained by other testimony. Yet he sold the vessel soon after for thrice the amount. How far the fiduciary tie between him and his partner should have restrained him from engaging in the purchase, or whether he was right in entering into competition with other purchasers, under the circumstances, is not now to be determined. Whether that purchase is to be considered for his exclusive benefit, or whether he is accountable, upon the resale, at the advanced price, must abide the ultimate decision of the case. At all events, the complainant claims now to stand in that relation to the disposition of the property. If this should be established, it is difficult to conceive, as the answer insists, that the appellant could make any remittance home on his own account, unless from speculations in the common fund, as the bill charges. The appellant, it is true, claims the fund remitted, to have been his own private property, but there is no explanation of

the manner in which it was acquired; and this averment of the answer, is at least weakened by the testimony and other pregnant circumstances in the case.

It is further a part of the charge against the appellant, that while he agreed that the services of each to the concern was to be reciprocal and without charge, he has detained out of the joint fund large sums claimed for primage, wages, and collecting freights, which he is not entitled to withhold from the assets. And this agreement is supported by evidence of his own declarations to that effect. That a change of the relations between them, after his departure, and the subsequent events at *San Francisco*, might not, in equity, modify or release the arrangement, we do not mean to say. But so long as the matter remains in dispute, all these sums for the purposes of the controversy, must be considered as part of the joint assets, and so far neutralise the averment of the appellant, that they are his private property, until he establishes it by the future decision of the court, when it comes properly before them. The fund being then already in the hands of a receiver, and the whole of the accounts between the parties, being under the control and investigation of the court, we think there was sufficient shown to induce the court to retain the receiver until their final determination; and we can see no immediate mischief or irreparable injury to the appellant from this course.

It is assumed by the appellant, that the court, as preliminary to the appointment of a receiver, must also further be satisfied, that the property is in imminent peril. This, however, is not always a necessary condition to the action of the court. Against the legal title, or a strong presumptive title in the defendant, the court would interfere with great reluctance; and only where the property was in danger of being materially injured or lost. But in respect of a fund which is claimed, and is *prima facie* the proceeds of a partnership, it is but a provident exercise of equity power to place the property under the care of the court. It has been laid down by *Lord Eldon*, that “if one partner, in the ordinary course of trade, seeks to exclude another from taking that part in the concern which he is entitled to take, the

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court will grant a receiver." 1 *Swanst*, 481. And "whenever a dissolution has taken place, or is intended, if one partner behave unrighteously against the interest of the others, or carries on trade with the partnership effects on his own account, after the dissolution, or in any other manner excludes his copartner from that share to which he is entitled in winding up the concern," it presents a case for a receiver. *Collyer on Partnership*, sec. 354.

Such is the *prima facie* case here presented by the bill, and not sufficiently repelled, at least until the defendant makes out by proof a clear right to the credits which his accounts claim for him. The proof, in part, indicates, (we do not say conclusively,) that it was agreed between the parties, that a portion of the charges here insisted upon, are excluded by the terms of the partnership. The appellant may still be able to maintain them at a final hearing. We pass no opinion upon their validity; we have no right to do so in this stage of the proceeding. But we decline to rescind the order, believing the fund to be in proper custody for the present, without intending the slightest imputation or suspicion of the integrity of the defendant, which is not necessarily impeached by this decision of the court. We believe the case to be fully covered by the law that applies to it, and the order of *Baltimore* county court in the premises is affirmed.

ORDER AFFIRMED.

JERVIS SPENCER, ONE OF THE EXECUTORS OF RICHARD RAGAN, DECEASED, vs. WILLIAM RAGAN.—*June* 1851.

A devisee of lands under a will, applied to the orphans court to have the rental proportion of certain crops, growing upon said lands at the death of the testator, stricken from the inventory of the personal estate in which it

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had been included and returned. Only one of the three executors answered this petition, and the court passed an order granting the prayer of the petition. **HELD:**

- 1st. That all the executors had an equal interest in the matter in controversy and the order should be reversed for want of proper parties, if for no other reason.
- 2nd. That the orphans court had no jurisdiction over the subject matter, in the manner in which the proceedings were brought before it.
- 3rd. That the devisee has sustained no such injury or invasion of his rights as would entitle him to seek redress therefor in the orphans court.
- 4th. If his possessory rights to the property are involved by this appraisal, he must assert them before the appropriate tribunals of the State in the same manner as if the injury had been perpetrated by any private individual.

APPEAL from the orphans court of *Washington* county.

Richard Ragan, Sen., by his will executed on the 19th of April, 1843, devised to his son, *William Ragan*, the appellee, a farm called "*Downey's Lot*," and appointed *Charles MacGill, Jervis Spencer* and *Richard Ragan, Jr.*, his executors. The testator died in November, 1850, and on the 29th of the same month, the will was admitted to probate, and letters testamentary granted to the said executors. The testator had, on the 13th of February, 1841, leased the said farm to *Henry* and *John Lowrey*, for one year, on shares, they, the *Lowreys*, rendering to the testator for the farm, one-half of the produce thereof. The *Lowreys* farmed the land for the one year accordingly, and after the expiration of the year, held over, and continued to hold over until the death of the testator, rendering the same proportion of the annual produce of the farm, and in all respects observing the terms of the lease of the 13th of February, 1841. At the death of the testator, there was growing on the land, a crop of grain seeded by the *Lowreys*, according to this agreement, one-half of which was appraised and returned in the inventory as part of the personal estate of the testator.

The appellee, the devisee of the land, then filed his petition in the orphans court, asking to have the rental proportion of said crop stricken from the inventory. The appellant, one of

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the executors, alone answered this petition, claiming that said crops are emblements and personal property, which properly devolve on the executors.

Upon this petition and answer, the orphans court ordered that "the rental proportion of said grain in the ground, and growing thereon at the death of the testator, be stricken from the inventory, as being illegally and improperly returned therein." From this order the appellant appealed.

The cause was argued before DORSEY, C. J., SPENCER MARTIN and FRICK, J.

By J. SPENCER and McLEAN for the appellants, and
By ALVEY, for the appellee.

DORSEY, J., delivered the opinion of this court.

The decree in this case must be reversed, if no other cause for reversal existed, on the ground of a want of proper parties. The proceedings show that there were three executors of *Richard Ragan*, the testator, but one of whom appeared in the orphans court and answered the petition of the appellee, though all in their character as executors, had an equal interest in the matter in controversy, and in the decree passed by the court. But it must be reversed on another ground; the orphans court had no jurisdiction over the subject matter, in the manner in which the proceedings were brought before it. The petition was not filed by one having an interest in the estate of the deceased, as creditor, legatee or distributee, invoking the aid of the orphans court in compelling executors or administrators to charge themselves with assets of the deceased, improperly omitted from the inventory, nor was it an application by an executor or administrator to be discharged from liability, or to be allowed a credit in his accounts, settled before the orphans court, for property returned in the inventory, as a part of the deceased's estate, when in fact it was the property of a third person. In such cases the orphans court has jurisdiction over the subject matter, and may rightfully adjudi-

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cate between the parties. But in a case like the present, where the only injury complained of, is the appraisement and insertion in the inventory of the deceased's personal estate, property which belongs to a third person, he thereby has sustained no such injury or invasion of his rights as would entitle him to seek redress therefor in the orphans court, or any other judicial tribunal. If his possessory rights to the property are invaded, he must assert them before the appropriate judicial tribunals of the State, (of which the orphans court is not one,) in the same manner as if the injury complained of, (if injury it were,) had been perpetrated by any private individual.

The decree of the orphans court should be reversed, but without costs in this court, and the petition of the appellee, filed in the orphans court, be dismissed with costs in that court to the appellant.

JUDGMENT REVERSED WITH COSTS

JAMES T. HENDERSON vs. WILLIAM JASON AND OTHERS.
June 1851.

On a petition for freedom it was proved that *Rachael*, the mother of the petitioners, was permitted by her mistress in the spring of 1831, to go and live with *Aaron* her reputed husband, under an agreement between the mistress and *Aaron*, that he should have *Rachael* free forever thereafter, upon condition that he would raise and support for her mistress two of *Rachael's* children then born. At that time *Rachael* was thirty-five years of age, and able to work and gain a sufficient livelihood and maintenance, and has ever since up to the trial of the case in April 1851, gone at large and acted as a free woman, and was still at large and so acting, never having been molested by her mistress, who died 1846, (and who during her life knew of and assented to *Rachael's* so going at large and acting as free,) nor by her representatives since her death. The petitioners were born whilst *Rachael* was so going at large, and filed their petition for freedom in March 1849. **Held:**

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- 1st. That it is competent for the jury to presume from these facts that her mistress legally manumitted *Rachael* before the birth of the petitioners, and that it was not necessary to prove that *Rachael's* mistress manumitted them or either of them, by a deed executed according to the act of 1796, ch. 67, by the actual production of such deed
- 2nd. That the jury from these facts ought to presume that *Rachael* was legally manumitted at the time she was first suffered to go at large, and that her children born while she was so going at large are entitled to their freedom.

APPEAL from *Anne Arundel* county court.

The appellees, *William, Reuben, Asbury*, and *Louisa Jason*, by *Aaron Jason* their father and next friend, on the 12th of March 1849, filed their petition for freedom in *Howard District* court, alleging that they were entitled to their freedom, but were unjustly detained in servitude by *James T. Henderson* of said district, the appellant, who answered the petition denying the right of the petitioners to their freedom, &c. The cause was then, upon suggestion of the petitioners, removed to *Anne Arundel* county court for trial, where it was tried at April term 1851.

1st. EXCEPTION. The petitioners proved by *Alfred Warfield*, that the petitioner *William* is now nineteen, *Reuben* thirteen or fourteen, *Asbury* fifteen, and *Louisa* about seventeen years of age. That they are all healthy, and witness has known them from their youth. Their reputed father is *Aaron Jason*, with whom they had lived from their birth until the defendant took them. Their mother was *Rachael*, who up to 1830 was the slave of *Mrs. Francis Warfield*. *Mrs. W.* died in 1844 or 1845. *Rachael* went to live with *Aaron* in 1830, by permission of *Mrs. W.* and under an agreement between *Mrs. W.* and *Aaron*. *Mrs. W.* told witness at different times, say half dozen times during her life, that *Rachael* was free. That *Mrs. W.* knew that *Rachael* was living with *Aaron*, who lived within a few miles of *Mrs. W.'s* residence, acting as a free man and was always so considered by witness.

Gustavus Warfield, another witness, proved that he always regarded *Aaron* as free, has attended him and the petitioners, his children, as a physician, and charged *Aaron* therefor, who

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paid him; that *Aaron* sometimes put out the petitioners for their victuals and clothes, before they were taken by defendant; that *Rachael* was living with *Aaron* as his wife, and in his house in April 1831. *Charles D. Warfield* proved, that his father owned *Aaron*, and that he was too old to set free when witness' father died, being over forty-five years. That witness in 1829 or 1830 let him go free for \$100, of which *Aaron* paid \$90, and witness gave up the rest; witness was the administrator of his father and as such accounted for the \$100 which *Aaron* agreed to give him; he did not know when *Rachael* went to live with *Aaron*, but thinks in 1832 or 1833; *Aaron* told witness that he had paid a consideration for *Rachael*, but witness never knew him to detain her as a slave.

The defendant then called up the first witness, *Alfred Warfield*, and asked him what was the contract between *Mrs. W.* and *Rachael* or *Aaron*? He stated that the agreement was that in consideration that he, *Aaron*, should support and bring up two of *Rachael*'s children then *in esse*, *Arch* and *Sam*, she, *Rachael*, was to be free. Defendant further asked him whether he was examined as a witness in the trial of an action of *trover*, brought by *Aaron* against the present defendant, in which *Aaron* demanded the petitioners as his slaves, and whether on that occasion he did not state that *Rachael* was sold by *Mrs. W.* to *Aaron* as his slave? He answered that he did not so state. The defendant then proved by *Hobbs* and *Iglehart*, that in said trial said *Warfield* had stated that *Aaron* purchased *Rachael*. The defendant then offered in evidence the record of proceedings in said action of *trover*, from which it appears that a verdict was rendered for the plaintiff therein, but was set aside and a new trial ordered. The defendant stated that he offered such record in evidence for the purpose of showing that upon the evidence in that action, and after the testimony of said *Alfred Warfield* had been given to the jury in that case as above stated by *Hobbs* and *Iglehart*, a verdict was rendered in favor of *Aaron*, as the owner of the petitioners, so as thereby to sustain the testimony of said *Hobbs* and *Iglehart*, and to show that *Alfred Warfield* is now in error when he states that

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Rachael was to go free. The petitioners objected to the admissibility of such record, for that purpose, and the court (WILKINSON and BREWER, A. J.,) sustained the objection, and refused to permit said evidence to go to the jury. The defendant excepted.

2ND. EXCEPTION. The defendant then proved by *Talbot G. Shipley*, that witness was called upon by *Eli G. Warfield*, the agent of *Mrs. W.* his mother, to witness an agreement or understanding he was going to make as such agent with *Aaron*. He, *Eli*, stated that he was going to let *Aaron* have his wife *Rachael* free, and that the agreement or understanding was that *Aaron* should support the two children of *Rachael*, then *in esse*, for a certain time, which witness does not recollect. *Eli* stated that *Aaron* was to have *Rachael* free. Witness then asked, if for a term of years or for life? *Eli* said forever:—that *Aaron* was to have full possession of his wife, from the time of the agreement. The same witness proved that *Sam*, one of *Rachael*'s children, staid with *Aaron* about six months or a year, and was taken away by *Eli* for his mother, *Mrs. W.*, and that *Arch*, the other child, staid longer; but witness did not know how long. The petitioners then proved that *Arch* staid five or six years, and then was taken away by *Eli* for his mother. They also proved that when *Sam* and *Arch* left *Aaron*, they were able to work, and that at the time *Rachael* went to live with *Aaron* she was under forty-five years of age, and able by her labor to gain a competent livelihood.

The defendant then proved that the petitioners, except *Reuben*, were born before *Arch* left his father as stated. He also proved by *Hobbs* that in 1846, after the death of *Mrs. W.*, witness at the instance of the defendant appraised the petitioners as part of the estate of *Mrs. W.* The petitioners then asked two instructions to the jury:

1st. That from the evidence in the cause it is competent for the jury to presume that *Mrs. W.* was the former owner of *Rachael*, the mother of the petitioners, and that *Mrs. W.* in her life time legally manumitted the said *Rachael* before

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the birth of the petitioners, and that it is not necessary to entitle the petitioners to a verdict, that they prove that *Mrs. W.* manumitted them or either of them by a deed executed, acknowledged and recorded, agreeably to the act of 1796, ch. 67, by the production of such deed.

2d. That if the jury find from the evidence that *Rachael* was set at large and suffered to go to the house of her husband *Aaron*, and live with him in the spring of the year 1831, by her mistress, *Mrs. W.*, under an agreement or understanding between her and *Aaron*, that he should have his said wife free for all time, from the time of said agreement or understanding, and that with the knowledge and consent of said *Mrs. W.* said *Rachael* from the time aforesaid, has lived with her husband, and has gone at large and acted as a free woman for the space of twenty years next before the present time, and that she has not at any time been molested by the said *Mrs. W.* during her life, nor by her administrator since her death, and that she is still at large acting as a free woman, and that at the time said *Rachael* was first set at large by said *Mrs. W.* she was of the age of thirty-five years and able to work and gain a sufficient livelihood and maintenance by her labor, then the jury ought to presume that said *Rachael* was legally manumitted at the time she was first suffered to go at large by her mistress as aforesaid; and if they further find that the petitioners are the children of *Rachael*, born while she was so going at large and acting as a free woman with the consent of the said *Mrs. W.* as aforesaid, then their verdict ought to be for the petitioners.

The court granted these prayers and the defendant excepted.

3d EXCEPTION. The defendant then asked the following instructions:

1st. If the jury find that the petitioners are the children of *Rachael*, and that *Rachael*, up to the spring of 1831, was held by *Mrs. W.* as her slave, and that said *Mrs. W.* died in 1846, without having manumitted *Rachael* by deed or will, executed and recorded according to law, and without having made any sale or disposition of said *Rachael*, then the petitioners are not

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entitled to their freedom, even if the jury find that *Rachael*, in the spring of 1831, with consent of *Mrs. W.*, went to live with *Aaron* as his reputed wife, and continued to live with him up to the death of *Mrs. W.*

2nd. If the jury find, that there was some parol understanding between *Mrs. W.* and *Aaron*, as to the terms on which *Rachael* should go to live with him, such understanding cannot avail to entitle the petitioners to their freedom, if they believe that *Aaron* at that time was a slave.

3d. If *Rachael* was not legally manumitted, according to the act of 1796, ch. 67, the jury must find for defendant, though they may also find that *Mrs. W.* let *Rachael* go at large in 1830, as a free woman, and that she so continued until about the year 1846 or 1847, and though they further find that *Mrs. W.* received a consideration therefor.

4th. If *Rachael* was not legally manumitted, according to the act of 1796, ch. 67, they must find for defendant, though they may believe that *Rachael* went at large from the year 1830 to 1846, with the knowledge of *Mrs. W.*, under an agreement with *Rachael* or *Aaron*, or by some one for them or either of them.

5th. If *Mrs. W.* agreed, verbally, with *Aaron*, in 1830, that *Rachael* and her after born children, the petitioners, should be free, for the consideration that *Aaron* should support two of his children then born, and if *Aaron* did not support said children, according to said agreement, then the jury cannot presume any valid deed of manumission of *Rachael* or of petitioners, and they must find for defendant.

6th. If *Rachael* lived with *Aaron*, and he was a slave, it is not such evidence of her going at large as will authorise the jury to presume a deed of manumission.

7th. Under such verbal agreement as is stated in the 4th prayer, the jury cannot presume the freedom of *Rachael* before the end of the time during which such agreement was to be executed, and therefore they ought to find for defendant as to all of the petitioners born before that time.

8th. If, under petitioners' first prayer, the jury presume a

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valid deed of manumission of *Rachael*, they cannot presume any such manumission of petitioners, unless they presume that deed to have been executed before the birth of the petitioners.

9th. If *Rachael* was the slave of *Mrs. W.* up to the spring of 1831, and no deed of manumission was executed at any time by *Mrs. W.* to *Rachael*, and *Rachael*, with consent of *Mrs. W.*, went, in the spring of 1831, to live with *Aaron*, a negro slave, and lived with him until the death of *Mrs. W.*, they must find for defendants, though they may believe a verbal contract was made by *Mrs. W.* with *Aaron*, in relation thereto.

10th. If the jury believe as stated in the 6th prayer, then they ought not to presume a deed of manumission, though they may believe there was a verbal contract between *Mrs. W.* and *Aaron* that *Rachael* should go free.

11th If *Rachael* was the slave of *Mrs. W.* until the spring of 1831, and was then permitted by *Mrs. W.* to go and live with *Aaron*, by virtue of an agreement with *Mrs. W.* and *Aaron*, or if *Mrs. W.* permitted *Rachael*, in the spring of 1831, to go at large as a free woman, and petitioners are her children, then the jury ought not to presume that *Rachael* was legally manumitted in any period of time of such going at large, less than twenty years next before the commencement of this action, and must find for defendant.

12th. If *Aaron* was a slave in 1830, and so continued from the time *Rachael* went to live with him as his wife, and he purchased her from *Mrs. W.*, and if *Rachael* was not otherwise set free than by being permitted, under some understanding between *Mrs. W.* and *Aaron*, to live with him as his wife, and if *Rachael* did not go at large, except as the wife of *Aaron*, and twenty years have not elapsed from the time of said understanding, or of *Rachael's* going to live with *Aaron* thereunder, to the time when defendant claimed and took petitioners, then they ought not to presume a deed of manumission of *Rachael*, and ought to find for defendant.

13th. If *Rachael* was purchased by *Aaron*, and continued his slave until the death of *Mrs. W.*, so far as she could be

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the slave of *Aaron*, that is, that she continued under his control, as such slave, until 1846, then petitioners are not entitled to a verdict.

The court granted the *second*, *third* and *eighth* prayers, and rejected all the others. Defendant excepted, and the verdict, and judgment being in favor of the petitioners, he appealed to this court.

The cause was argued before DORSEY, C. J., SPENCE, MARTIN and FRICK, J.

HOBBS and WM. SCHLEY, for the appellants, contended:

1st. That the petitioners, from the scope of the evidence, could only be entitled to a verdict, *provided* it were found by the jury, that their mother, *Rachael*, was a free woman at the respective periods when the petitioners were born.

2nd. That inasmuch as it is a conceded fact that *Rachael* was the slave of *Mrs. Frances Warfield*, deceased, at a specified period, and as all the petitioners were born before the decease of *Mrs. Warfield*, it results that said *Rachael* remained a slave at the death of said *Mrs. Warfield*, unless she was legally manumitted by said *Mrs. Warfield*, in her lifetime.

3rd. Such manumission could only be validly made by a deed of manumission; which, (upon a concession of the condition of slavery of said *Rachael*, at a given period,) must have been made, if at all, after such period.

4th. Proof was indispensable of the execution of such deed. Such proof could only be, by actual production of said deed, or of a copy thereof duly certified; or by proof of *facts*, from which it would result *as a presumption of law*, that such deed was duly executed, acknowledged and recorded.

5th. The facts in this case are not such as to form a basis for such presumption of law.

6th. But if there are any facts, from which, *if taken alone*, such presumption might be deduced; yet upon the whole proof, if believed by the jury, such presumption should not have been made. The rule, "*stabitur presumptio donec probetur in contrarium*," applies to the case.

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7th. The "going at large" of *Rachael*, having been shown to originate in an intended contract with negro *Jason*, the husband of *Rachael*; and it being a conceded fact that said *Jason* was, and is in law, a slave, such going at large formed no basis for a legal presumption, that *Rachael* was manumitted by a deed of manumission duly executed, acknowledged and recorded according to law.

8th. At all events, it is not the basis of a legal presumption, that such deed was so executed, acknowledged and recorded, at the very time the said *Rachael* first went at large, or before the petitioners were born.

WM. H. G. DORSEY and ALEXANDER, for the appellees, in answer to the first exception, insisted:

1st. That the verdict was *res inter alios acta*, and therefore, inadmissible, even for the purpose of discrediting *Alfred Warfield*. The verdict, whilst it stood, was only the conclusion of the jury from all the evidence given on the trial. It does not profess to have been founded on the testimony of *Alfred Warfield* in any degree, and affords no evidence whatever of what that testimony was.

In support of the first instruction granted in the second exception, they insisted:

2nd. That there was evidence from which the jury might presume that *Mrs. Warfield* had manumitted *Rachael* before the birth of the petitioners; and that to entitle them to a verdict, it was not necessary for the petitioners to produce a deed of manumission, executed, acknowledged and recorded agreeably to the act of 1796, ch. 67.

3rd. In support of the second instruction; that the petitioners are entitled to the benefit of the presumption arising from the actual enjoyment of freedom by their mother, down to the trial of the cause, and if such enjoyment of freedom continued for more than twenty years next before the trial, the petitioners were entitled to the verdict.

4th. That upon the hypothesis that *Rachael* enjoyed her freedom for more than twenty years before the trial, she must

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have acted as a free woman for eighteen years before the filing of the petition in this cause, and such actual exercise of freedom, under the circumstances detailed in the second prayer of petitioners, would have entitled them to the verdict.

And in support of the rulings of the court in the third exception, they insisted.

5th. In relation to the defendant's first prayer: That it assumes the obligation of the petitioners to prove their title by exhibiting a deed of manumission, which is inconsistent with the first instruction granted on the prayer of the petitioners; on any other hypothesis, this prayer is virtually granted by the granting of the defendant's third prayer.

6th. The defendant's fourth prayer involves the proposition, that to entitle the petitioners to the benefit of the agreement between *Mrs. Warfield* and *Rachael*, or her husband, it was necessary for them to prove that such agreement was fully carried out and executed by *Rachael* or *Aaron*, or some one for them. It is insisted that such proof was not necessary.

7th. In answer to the defendant's fifth prayer, it will be insisted that the petitioners were under no obligation to show that *Aaron* did support his two children, born at the time of the agreement between *Mrs. Warfield* and himself.

8th. In answer to the defendant's sixth prayer, that the fact that *Aaron* was a slave whilst *Rachael* lived with him, will not deprive her, or her children, of the benefit of the presumption arising from her actual enjoyment of freedom under the circumstances.

9th. In answer to the defendant's seventh prayer, that upon the agreement as proved, *Rachael's* freedom was to commence at the moment of her going at large, and was not to be postponed to a future day.

10th. In answer to the defendant's ninth prayer, then it puts it to the jury to find a deed of manumission as a fact, and in absence of proof of a deed actually executed, denies the right of petitioners to a verdict. This prayer could have been granted only on the hypothesis, that the first prayer offered by petitioners ought to have been rejected.

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11th. In answer to the defendant's tenth prayer, that it rests upon the same hypothesis with the sixth, and is equally erroneous.

12th. In answer to the defendant's eleventh and twelfth prayers, that a going at large by *Rachael* for twenty years before the filing of the petition, was not essential to warrant a presumption in favor of the petitioners.

13th. In answer to the defendant's thirteenth prayer, that it involves a position which is inadmissible in law, to wit, the purchase of *Rachael* by a slave, and involves, substantially, the proposition in the sixth prayer, and is equally exceptionable.

By the court.

JUDGMENT AFFIRMED.

JAMES KENT vs. HUGH MCKELDERY.—December 1850.

A writ was sued out returnable to the April term of the county court, at which term the defendant appeared, and rule *nar* was laid upon the plaintiff to the next rule day, being the 20th of September following. The declaration was not filed until the 19th of October, after the rule day. HELD: That the plaintiff was in *default*, and that defendant should be allowed to plead the next rule day.

Where a plaintiff is in default in not filing his declaration by the rule day, the court will extend the time for filing his declaration, provided he will consent to try or continue the cause at the option of the defendant.

APPEAL from *Anne Arundel* county court.

This was an action of *assumpsit* by the appellee against the appellant. The writ was sued out on the 1st of December 1848, returnable to the following April term of the court, at which term the defendant appeared and the plaintiff was laid under rule *nar* to the next rule day of the court, being the 20th of September following. The declaration was not filed un-

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til the 19th of October following the rule day. The cause of action was a promissory note of the defendant in favor of the plaintiff.

EXCEPTION. When this case at the first calling of the trial docket at October term 1849, was reached, the plaintiff prayed the court to lay a rule upon the defendant to plead by the second (which is the last and peremptory) call of the docket, stating that it was a plain and undisputed case which was not denied by defendant's counsel. The defendant then asked leave to imparle until the rule day of the next term of the court, but the court (DORSEY C. J., and BREWER A. J.,) according to the unvaried practice in like cases from the time of the passage of the act of 1829, ch. 166, a practice adopted and always since practiced under with a view to a compliance with the requisitions and designs of the said act, ordered the defendant to be laid under a rule to plead by the next calling of the docket at the present term. When the case was reached at the said next call of the docket, the defendant again asked leave to imparle to the next rule day, and referred the court to the following rules of court to show his right to such imparlance.

“19th. On an appearance to a single writ, the plaintiff may be ruled to file his declaration by the next rule day, but the court for special cause shown, may allow further time to declare, and on such terms as they may think reasonable, unless the court shall otherwise order.

“25th. If the plaintiff or defendant neglect to declare or to plead within the time limited by rule of court, judgment of *non pros.* or by default, as the case may be, shall be given, but the court for special cause shown, may allow further time to declare or to plead, and on such terms as they may think reasonable.

“26th. In all cases where rules are laid to declare or to plead, such declaration or pleading shall be filed by the twentieth day of March and twentieth day of September, respectively, next following the term, at which said rule was laid.”

“34th. No action or suit shall be continued beyond the term limited by law, with the consent of the parties, unless the

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issues are made up or unless some satisfactory reason is assigned to the court for not joining issue; ordered by the court that all *subpoenas* on the trial docket, be returnable to the first day of the term.”

But the plaintiff refusing his assent to such imparlance and requiring the court to enforce its said order on the defendant to plead, the court refused to grant the imparlance and entered judgment for default of a plea. It was agreed that there was no written rule of court authorising the court in such a case to lay the rule plea by the second call of the docket, and the defendant proposed to prove by members of the bar, that heretofore the court had adopted a different rule from that which is now enforced by the court. The court having a perfect knowledge and recollection of its aforesaid unvaried practice, refused to permit the testimony offered by the defendant, going to show the antecedent practice of the court. From the refusal of the court to permit the defendant to prove what had been the former practice of the court, and from the entry of the judgment against the defendant in default of a plea, the defendant excepted and appealed to this court.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

By PRATT, for the appellant, and
By RANDALL, for the appellee.

MAGRUDER, J., delivered the opinion of this court.

If the plaintiff in the court below, wished to have a trial or judgment at the second term, he ought himself to have complied with the rules of the court. Indeed he had it in his power to file his declaration when he instituted the suit, or he might have filed it during the first term, and have laid the defendant under a rule to plead by the rule day of the court, in this case by the 20th day of September, 1849. If either course had been pursued by him his right to a trial or judgment, (no legal cause for a continuance being shown by the defendant,) during the next or second term, could not have been questioned.

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Because he did not pursue either course before spoken of, the defendant laid him under a rule to declare, by the next rule day or 20th of September. With this rule he failed to comply, but filed his declaration some weeks afterwards. He then offered a declaration, to which no objection was made, other than it enabled the defendant to delay his plea until the next rule day. This was refused to him, and thus it was required of the defendant to plead and prepare for his trial, in a very few days after the filing of a declaration, which, for the first time, disclosed to him the plaintiff's cause of action.

The effect of giving to the defendant the time which he asked would have been a continuance of the cause, which it is said is forbidden by the act of 1829, ch. 166. But has the plaintiff any cause to complain of this? Why did he violate the rule of court, which gave to the defendant a right to a *non pros*? He called upon the court to sanction this violation of its rules, to extend the time allowed to him to file his declaration. This, it is understood, the court can do, provided he will consent to try, or continue the cause at the option of the defendant.

If the plaintiff could, in this suit, withhold his declaration, and thereby all knowledge of his cause of action, as long as he did, and yet claim a trial in the course of that term, he might have withholden it until the court reached the case when going over the docket the last time, and then have insisted upon a plea or judgment *instanter*. Indeed, according to the reasoning of counsel, a judgment ought to have been given to him, although no declaration was then tendered. As to this being an undisputed case, and for that reason the plaintiff had a right to a judgment, all that we can know is, that courts must learn that the from defendant, and not from the plaintiff, and must be content to know it, only when the defendant has had a reasonable time to determine what defence he ought to make.

A plaintiff who, after taking six or eight months to find out his cause of action, then violates the rules of court, is a person *in default*, and if he asks as a favor, that his *nar* be still received, must claim nothing of a defendant that term. It is most unreasonable in him to expect that the defendant will be

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prepared for trial in two or three days after the plaintiff's claim is stated to him. Such a plaintiff has no reason to complain that he cannot get a judgment the second term.

In this case, until the declaration was filed, the defendant could not tell whether the plaintiff claimed of him the amount of an account, or of a promissory note, or damages in trover, or for slanderous words, or other cause of action which will sustain an action on the case. While he is thus left in ignorance of the plaintiff's cause of action, it would have been most unreasonable to require him to have in attendance the witnesses by which he might defeat all, or indeed any one of these claims.

We do not think that the rule to plead was laid in order to continue the cause, when it was reached in going over the docket the last term. The court had no more right to require a plea of the defendant at the time it did, and when the plaintiff was in default, than to have required the latter to file his declaration *instantly*, in order that the defendant might be prepared to demand a trial or *non pros.* the second term.

JUDGMENT REVERSED WITH COSTS,
AND PROCEDENDO.

BRIDGET BUCKLEY, ADM'X OF TIMOTHY BUCKLEY vs.
MARY BUCKLEY.—December 1850.

A bill was filed by a distributee against the administratrix, for her distributive share of the intestate's estate, alleging herself to be one of the four children of the deceased. The bill was taken *pro confesso* against the administratrix, and upon the suggestion of the death of one of the four children, intestate and without issue, the estate was decreed to be distributed among the three remaining children. **Held:** That this decree was erroneous.

Though one of the children may have died intestate and without issue af-

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ter the death of the father, the complainant can only claim one-fourth of the estate from the father's administratrix. Her share of her deceased brother's estate, she must claim from his administrator.

If the father in fact survived the son, the complainant cannot, under a bill which denies this fact, claim to be entitled to the one-third of the estate.

If there were satisfactory proof that there were but *three* children, the complainant cannot contradict her bill which has been taken *pro confesso*.

The decree only directed the share of complainant to be paid to her, and took no notice of the shares that had been awarded to the other distributees.

HELD: That this cannot be right.

APPEAL from the equity side of *Baltimore* county court.

The bill in this case was filed by the appellee on the 31st of October 1848, against the appellant as the administratrix of *Timothy Buckley*, deceased, for a distribution of the deceased's estate.

The bill alleges that the said *Timothy* died, in June 1847, intestate, possessed of a large personal estate, and leaving *four* children, viz: *Patrick*, *Catharine*, *Mary* the complainant and *Ellen*, all of full age, his distributees. That letters of administration were granted to the appellant who had possessed herself of the estate, and kept and applied it to her own use and had refused to pay to complainant her share thereof. The prayer is for an account and payment to complainant of her share, and also for an order of publication against said *Patrick*, *Catharine* and *Ellen*, who, the bill alleges, reside in foreign parts.

The order of publication was passed on the 19th of December 1848, against said absent defendants, to appear on or before the 19th of April 1849, to be published once a week for three weeks before the 19th of January 1849. The appellant having been summoned and failing to appear, and having stood out the process of attachment of contempt and proclamation, a decree *pro confesso* was passed on the 31st of January 1849, and the case referred to a special auditor, to state an account from the pleadings and proofs in the cause, and such other proofs as may be adduced to him by the complainant, and to report on or before the 19th of April 1849.

On the 19th of June 1849, the complainant filed a sugges-

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tion of *Patrick Buckley's* death, intestate and without issue, and unmarried, since the last continuance of the cause. On the same day the auditor filed his report, with testimony taken touching the death of said *Timothy* and other material matters, and distributing the estate among the appellant, as widow of said *Timothy*, and the three children, *Mary* the complainant, *Catharine* and *Ellen*, (omitting *Patrick*,) and awarding to each one-third of the estate, after deducting the widow's share. The final decree ratifying this report was passed on the 30th of June 1849. This decree adjudges that the bill be taken *pro confesso* against the absent defendants, and orders the account of the auditor to be ratified and confirmed, and the defendant *Bridget*, as administratrix of the deceased, to pay to the complainant the sum awarded to her. From this decree the administratrix appealed.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK, J.

By ROBT. J. BRENT, for the appellant, and
By T. P. SCOTT, for the appellee.

MAGRUDER, J. delivered the opinion of this court.

This appeal is from a decree of *Baltimore* county court, sitting as a court of equity.

The bill was filed by a person, who alleges herself to be one of the *four* children of *Timothy Buckley*, and expressly charges that her father died, leaving four children. It is filed to recover her share of her father's estate; of course one-fourth of what remains in the hands of the administratrix, after paying debts, &c., and deducting the widow's portion.

Now if there were four children when the intestate died, this complainant can claim of the defendant only one-fourth of his estate. *Patrick* may have died immediately after his father, without will or children; the complainant may be one of his distributees, yet her share of his estate, she must recover from his administrator, although there be nothing for

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such administrator to do, except to pay funeral expenses, collect from his father's widow his share of the estate, in her hands, and distribute it among his legal representatives.

The allegation is that she is entitled only to one-fourth, and she cannot claim one-third without amending her bill, if perchance she was mistaken when she stated that her brother *Patrick* was not dead when her father died.

Here then is error, whether the father survived the son, or the son survived the father, and is now, or is not now, dead. If the father outlived the son, then the law entitled her to all that she has recovered, but her bill of complaint denies it. Which of them died first is to be ascertained by the complainant, and although there is some evidence in the record taken to prove that the father survived the son, yet it is by no means satisfactory to the court. The complainant suggested the death of the son, and that son's representative has never been made a party to the suit.

It would be difficult for us to tell how these errors are to be corrected, but as the case now stands, it is impossible to affirm or modify the decree.

The complainant gets the court to take her bill *pro confesso*, and now would insist that the bill in a material part of it is untrue. If there was satisfactory proof in the record that there were only *three* children, still, when the bill is taken *pro confesso*, how can she contradict it? Her bill cannot be impeached by her adversary, and surely it cannot be impeached by herself. The case of *West and Hall*, 3 H. & J., p. 223, warns us of some of the evils which may result to the complainant sometimes by a decree of this description.

This is a bill against an administratrix, asking a distribution of the intestate's estate, and making all the distributees parties. It was sent to the auditor to take an account of the assets, and he ascertains the sum due to each distributee, yet no notice is taken of the share of each of the other distributees. A decree is passed directing the payment by the administratrix of the supposed share of the complainant, and no payment to the others is directed, although the report which ascertains

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what is due to them is confirmed. Indeed they are not even “dismissed hence.” This cannot be right.

DECREE REVERSED WITHOUT COSTS, AND
CASE REMANDED.

E. L. ADAMS, SURVIVOR OF BURCKMEYER AND ADAMS,
vs. DAVID WHITEFORD.—*June* 1851.

Upon a bill for a discovery as to the ownership of a certain draft, upon which suit had been instituted in the name of the defendant against the complainant, the answer disclosed all the facts within the knowledge of defendants, and leaves the consequences of these facts, as far as they affect the ownership of the draft, to the court. **Held:** That this answer was sufficient to entitle the defendant to a dissolution of the injunction granted upon the bill.

APPEAL from the equity side of *Baltimore* county court.

This case arises out of a bill filed by the appellee on the 1st of February, 1849, to obtain discovery from *Burckmeyer* and *Adams*, with a view to his defence in an action of law then pending in their names, against him, in *Baltimore* county court, and for an injunction restraining proceedings upon the suit at law, until such discovery be made. The suit at law has been twice before this court, and all the facts of the case will be found in the reports of those appeals in 1 *Gill*, 127, and 6 *Gill*, 1. The injunction was granted as prayed, and upon the coming in of the answer, a motion was made for a dissolution, and from the order of the court refusing to dissolve the injunction, this appeal is taken. The allegations of the bill and answer are fully set out in the following opinion of the court below, delivered by (FRICK, C. J., and LE GRAND, A. J.,) upon their order overruling the motion to dissolve, passed on the 30th of October, 1849.

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“The bill states that suit was brought on the law side of this court, against the complainant by the defendants, alleging themselves to be the owners or possessors of the draft in question, upon which the complainant is endorser. The complainant charges that the said plaintiffs at law, are not now, and were not when this suit was brought, the owners or possessors of said draft, but that it was discounted at the *Western Bank of Baltimore*, and was in the possession of the bank when this suit was brought, by the direction of said bank, in the name of *Burckmeyer and Adams*. That these facts are a necessary defence to *Whiteford*, and he has used every means *aliunde*, to obtain the proof, and now claims that the defendants here shall discover upon oath, if they ever were the owners of said draft, or ever paid any value for it; whether at the time the suit was brought, they had *possession* of the same, or had returned it to the bank, and whether since the suit they ever had the possession? An injunction is prayed to restrain the trial of the action at law, until their answer in the premises.

The answer of *Adams*, (the surviving partner,) states that they never had any dealings with complainant. That in regard to their being the owners or possessors of the draft in question, it was sent to them for collection from the bank as its property. That it was protested for non-acceptance, and notice sent on to that effect to the bank, but the draft was retained by them until maturity, and being mislaid, was not presented to the drawees when due, for payment. That no notice of protest was therefore sent to any party of *non-payment*, nor did these defendants give any value for the same. That it was after maturity returned to the bank, who again returned it to defendants. That they again sent it enclosed to the bank, by letter of the 7th of October, 1840, a copy of which is filed with the answer (*See 1 Gill*, 133.) That they also wrote the letter of the 5th of November, 1840, to *T. Phenix*, cashier of the bank, a copy of which is filed, (*See 6 Gill*, 9,) and sent the same by due course of mail. That this is the only information in the power of respondent to give by way of discovery, and of his own knowledge he knows nothing of the possession

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of the draft at the time of suit, nor whether the facts stated in the answer constituted the legal ownership in them of said draft.

To this answer exceptions are filed: That the answer is evasive, and is no sufficient disclosure to the question, whether they were in possession of the bill at the time that the suit was instituted, or since? And that it does not expressly admit or traverse the allegation of the bill in relation to the possession of the draft, &c. The cause was set down for hearing upon bill and answer, by an order of this court of the 13th of February, for the 20th of February, 1849, and between these two periods the exceptions referred to were filed. After argument and hearing on this state of the case before this court, and while the subject was under advisement of the court, leave was granted, upon petition, to the defendants, to file a supplemental answer. In this answer, *Adams* states that he knows nothing of the matters of fact stated in the bill of complainant, but what appears on the face of the bill of exchange in suit, and what may be further found in the correspondence of defendants, with *T. Phenix*, cashier, which was several years ago sent to *Robert J. Brent* and *O. Horsey*, attorneys in *Baltimore* city, (*See 1 Gill*, 132, 133. *6 Gill*, 2, 3, 7, 8, 9, 10, 11;) that in regard to claiming title, they claim no other title or right than is claimed in the above correspondence, nor did they give any authority to sue other than such is there found, although they were aware that such suit had been brought in their names, and they have made no objections thereto. The case is now upon the motion to dissolve, presented *de novo*, to this court for its decision, and upon the prayer of the complainant that the supplemental answer may first be taken off the files of the court, and the order allowing it, to be revoked.

The effect of withdrawing from the files this supplemental answer, is to leave the defendants upon their original answer, which being, as is contended, defective and insufficient, must constitute the injunction perpetual; because it is further insisted by the complainant, that the respondents are bound to abide by their original answer, which admits of no supplement or

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amendment, but upon the ground of mistake, or the occurrence of new matter since the answer, suggested upon motion and affidavit to the court; all which it urged is not averred in the case before us. Without stopping to question or deny this doctrine thus laid down upon authorities produced, how would this dispose of the exceptions to the answer which the complainant has himself interposed? He denies the sufficiency of the answer for the purpose he has in view, to discover whether the plaintiffs at law, are the holders or possessors of the draft in question, or have such an interest in it as entitles them to sue upon it. The exceptions assume of course that the complainant requires a more distinct and explicit answer. And the respondents yielding to the force of these objections to the original, upon leave granted by the court, assume in a supplemental answer, to supply the defects and insufficiencies of which the exceptions complain. This is not the case of a defendant coming in to correct a mistake, or to alter the character of his original answer, seeking of his own *motion* or *accord* to make a better case than he had before. But he is invoked to this course, as it were, at the instance of complainant, not to correct the old, but supply new and additional matter; to be more explicit in his statements on the points suggested by the complainant, as being insufficient before. Whether he has done so or not, is the true question before us, conceiving as we do, that the supplemental answer is rightfully in, and that we are called upon to decide upon the whole case as now presented.

To this purpose we have given to these answers a candid and full examination, and cannot satisfy ourselves that they meet the allegations and the object of the bill. The open and avowed object is, to obtain from the plaintiffs discovery whether they have ever had any interest in the suit at law brought in their names against *Whiteford*? The possession of the draft at the time of directing or instituting the suit, would be sufficient *prima facie* evidence to sue upon it. If we construe that answer properly, it negatives the possession in them, particularly if added to the admission that they paid no value for it. Their connection with this draft, they say, is disclosed by the letters

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between them and the bank, and thus, whether they have any interest in this draft or in this suit, they refer to the legal construction of their correspondence with *Phenix*. Surely there must exist better ground for standing in the attitude of a plaintiff, than the doubtful, unascertained position which they assume here. Even under all the circumstances, they must have some impression, if not conviction of their own upon the subject, and even this impression of their rights, as plaintiffs, they hesitate to express. In any view of these answers, they have either not fully met the disclosure sought by the complainant, or as far as they have disclosed, have shown no interest or possession in the draft, so far as to constitute them legal plaintiffs in the action at law, and the motion to dissolve is therefore overruled."

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE and MARTIN, J.

By ROBT. J. BRENT, for the appellants, and
By WALLIS for the appellee.

CHAMBERS, J., delivered the opinion of this court.

The bill of complainant does not deny the obligation of complainant to pay the amount of the note or draft. It is not denied that the money is due either to the appellants or to the *Western Bank*.

It is manifest from the whole case that the suit was instituted by the immediate actual order of the bank in the name of the appellants, and that after the suit was instituted in the name of the appellants, they acquiesced in it.

The appellant, *Adams*, fairly answers all the facts within his knowledge, and properly, in such a case as this, leaves the legal consequences of these facts to the court. What did or did not constitute in law the possession or ownership of the draft has been a subject of earnest litigation for years past, and one which the appellants were not required to decide, and were probably not competent to decide. Without saying whether the injunction was properly issued, we are of opinion that the

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answer was sufficient to entitle the appellant to a dissolution. As the matter disclosed in the answer may be used in evidence by the appellee on any future trial at law, we remand the case to the county court.

INJUNCTION DISSOLVED, AND CASE REMANDED.

WILLIAM TOWNSHEND AND OTHERS, vs. JEREMIAH TOWNSHEND AND JOHN B. BROOKE, Exc'rs of JOHN TOWNSHEND.—June 1851.

Issues framed upon a *caveat* to a will, and sent by the orphans court to the county court for trial, may be removed to any adjoining county for trial.

An attesting witness to a will declared, on the same day that the will was executed, that he did not believe the testator to be, at the time he executed the will, a sane person, and that he signed the will as a witness, merely to gratify the testator. **Held:** that these declarations, (the witness being dead,) are properly admissible in evidence.

The attestation of a witness to a will, imports all that is requisite to make the will good and valid, so far as his signature can go, and his declarations, (the witness being dead,) are admissible to impeach these presumptions of law.

APPEAL from Anne Arundel county court.

On the 8th of June, 1846, the appellants, who are next of kin of *John Townshend*, late of *Prince George's* county, deceased, filed, in the orphans court of said county, a *caveat* against the admission to probate of a paper purporting to be the last will and testament of said deceased, executed on the 17th of December, 1844, and offered for probate by the appellees, the executors therein named, on the 15th of May, 1846. The executors answered the *caveat*, and thereupon the said orphans court directed certain issues, framed by the *caveators*, to be sent to *Prince George's* county court for trial. At the first trial in said county, the jury could not agree, and were dis-

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charged. On the second trial, the jury rendered a verdict for the caveators, and the county court adjudged the record to be transmitted to the orphans court, with costs to the caveators. The caveatees, having excepted to various opinions and instructions given by the court in the progress of the trial, appealed, and this court, at its December term, 1848, reversed this judgment, and remitted the record to *Prince George's* county court, by writ of *procedendo*. The proceedings on this appeal are reported in 7 *Gill*, 10, where the paper purporting to be the will, and the several issues will be found in full.

This alleged will was executed in presence of *Philemon Chew*, *Walter B. C. Worthington* and *James J. Chew*, and by it the testator confirms a deed, executed by him, on the 24th of December, 1831, manumitting his slaves, and to remove all doubts as to the validity of this deed, he bequeaths freedom to all his slaves, he also devised to his said slaves and their increase, all his property, "both real and personal, to be divided amongst them equally, share and share alike, to them and their heirs forever."

The cause being thus remanded to *Prince George's* county court, at April term, 1850, of said court, upon the suggestion of the caveatees, that a fair trial could not be had in that court, the record was ordered to be transmitted to *Anne Arrundel* county court, for trial of said issues, and at April term of the latter court, when the case was called, the caveators moved that the proceedings be remanded to *Prince George's* county court, on the ground that the act of removal was illegal, said last mentioned court having no right to remove issues sent to it from the orphans court to a court without their judicial district, the case of issues from the orphans court not being embraced by the provisions of the act of 1804, ch. 55. But *Anne Arundel* county court, (WILKINSON and BREWER, A. J.,) overruled the motion and tried the cause.

In the course of the trial, three exceptions were taken, one by the caveators, and two by the caveatees. The 1st issue was the one chiefly relied on, viz: "Whether the said *John Townshend*, at the time of signing said paper or instrument of writing,

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purporting to be his last will and testament, was of sound and disposing mind, and capable of executing a valid deed or contract?" And the caveators endeavored to prove, that in reference to his negroes and the disposition of his property by last will, he labored under a delusion, and that the paper propounded as his last will and testament was the immediate result of such delusion.

1st EXCEPTION. By the caveatees. This exception states, that the caveators, after reading to the jury the paper propounded as the last will and testament of *John Townshend*, deceased, admitted to be in the handwriting of *John B. Brooke*, one of the caveatees, called up their witnesses to be sworn, and amongst others, *Michael B. Carroll*. The caveatees required said *Carroll* to be sworn on his *voir dire*, and being so sworn, the caveatees asked him whether he had any interest in the event of this suit. He answered that he had not. The caveatees then proposed to examine him further and more particularly, for the purpose of showing that he was really interested in the event of the suit. But the court refused to permit such further examination, being of opinion that he had answered the only question which could be put to him on his *voir dire*, and ordered said witness to be sworn in chief, and he was accordingly so sworn. The caveatees excepted.

2nd EXCEPTION. By the caveatees. States, that said *Carroll* having been so sworn in chief, was examined as a witness on the part of the caveators, and proved various facts and circumstances, tending to prove the issues on their part. On cross-examination, the witness proved, that on the 13th of October, 1840, *John L. Townshend*, one of the caveators, applied for the benefit of the insolvent laws. That witness was, at the time of said application, a creditor of said insolvent. That afterwards, other dealings took place between witness and the insolvent, in pursuance of an agreement then made between them, that if witness would advance him money and goods, he, the insolvent, would, at a future time, secure witness as well for his former debt as for said debt newly contracted, and the insolvent became indebted to the witness in the further sum

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of \$200, or thereabouts, and that several years afterwards, the insolvent secured both debts, by conveying to witness two negroes, by an absolute bill of sale, and witness thereupon delivered up the note for the old debt.

The caveatees thereupon objected to the competency of said witness, and prayed the court to exclude all his testimony from the jury. But on further examination, witness declared, that he looked to said negroes as his only security for payment of said debts, and that he had no claim as a creditor against the estate of said insolvent, which had come, or should come, to the hands of his trustee, and thereupon executed a release to said *John L. Townshend*, of all and every claim and interest which he had, or may, in any event, by possibility have in the estate which has vested in his trustee, or which may hereafter vest in said trustee, for the benefit of the creditors of said *John L. Townshend*; “The object and end of this release is to divest myself of any and all interest in the estate, which, under the said application, has vested in such trustee, for the benefit of the creditors of said *John L. Townshend*, or which, subsequent to said application, may have accrued in right of said *John L. Townshend*, by gift, descent, devise, or in any course of distribution, or which may or shall hereafter so accrue. And if, from any cause, this release cannot operate to divest me of such claim and interest, then, for value received, I assign, transfer and make over to the said *John L. Townshend*, all my rights, present and future, in or upon the assets which have vested, or which may vest in such trustee, under said application, in respect of any claim which I may have against said *John L. Townshend*, which accrued or was created prior to his said application. But this instrument is sealed and delivered by me, with a reservation of all and any claims which I may have against said *John L. Townshend*, created since said application, and also with a reservation of my rights and property in and to certain negroes heretofore conveyed to me, by bill of sale, by said *John L. Townshend*, and which bill of sale is of record in *Prince George’s county*.”

And witness being further examined, stated, that one of said

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negroes, named *Charles*, formerly belonged to said insolvent before his application, and had been conveyed by him, by bill of sale, to one *James Baden*, to secure a debt of \$500; and that after his discharge, the insolvent paid said debt to *Baden*, and got back said negro, and had conveyed him to the witness, as before stated, *Baden* having previously declared to witness, that he had no claim upon the negro, and that his debt had been fully paid. The witness stated, that the other negro, after the discharge of the insolvent, was obtained by *Townshend* from *Baden*, upon an exchange for another negro, which said negro, so given in exchange by *Townshend* to *Baden*, had, before his application, been given by *Baden* to the wife of said insolvent, who was *Baden's* daughter. But whether said negro had been so given by *Baden* to his daughter, absolutely or not, he does not know. He knows that said negro had belonged to *Baden*, and he also knows that said negro was in *Townshend's* possession at the time of his application. He also knows, that after *Townshend's* application, said negro remained in his possession until the exchange of negroes between the parties was made, as aforesaid; and he also knows, that before said application, the wife of *Townshend* claimed said negroes as given her by her father.

The court thereupon overruled the objection, and were of opinion that *Carroll* was a competent witness for the caveators, and refused to exclude his testimony from the jury. The caveatees excepted.

After the cause had been, in part, argued before the jury, the bill of sale referred to by *Carroll* was produced, and read to the jury, by consent of parties, and proved to be a mortgage of the two negroes spoken of in *Carroll's* testimony, executed on the 11th of April, 1846, by *John L. Townshend* to *Carroll*, to secure an indebtedness from the former to the latter, consisting of two sums, one of \$192.50, with interest from the 21st of December, 1839; the other, of \$136.23, with interest from the 1st of January, 1841, for each of which a judgment had been entered in *Prince George's* county court. The condition of this mortgage was, that the grantor should pay the said

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sums within three years, and in the meantime the mortgagor was to have possession of the negroes.

3RD. EXCEPTION. By the caveators. The caveators further proved by numerous competent witnesses, that they knew the said *John Townshend* in his life time, some of them having known him for thirty years, others for only a short period, and others for many years, before his death. And that said *Townshend* at the time of his decease, was a very aged man, that during the whole period of their knowledge of him he was accustomed to speak of himself as a spiritualized man, that he was not in flesh, but that he had died and risen from the dead; that he spoke of himself as a person who was to live for the term of five hundred years; that he represented that at all times there was on earth one person who was peculiar and unlike other persons, and that he was such peculiar person then living on the earth; that he had frequent personal interviews and conversations with *God Almighty*, and was accustomed to receive immediately from *God*, directions, instructions and commands, in relation to what he should do, and what he should not do; that he stated that many years ago, he had engaged himself to a girl to be married, and had obtained her father's consent to the proposed union, but that as he was returning home after the engagement, *God* spoke to him or inquired of him, "*Jockey* where have you been, and what have you been about?" that he answered and stated that he had been courting and had engaged himself to be married, that *God* then asked him whether he had made a stipulation to have the right to return her to her father, if on trial he should find that she did not suit him? and that upon answering in the negative, he was directed to return to the house of her father, and insist on a stipulation to this effect, and that he thereupon did return to the house of the father of his intended bride, and proposed to him to include such stipulation in the agreement, and was so rudely repulsed, that he never afterwards made any attempt to marry. That said *Townshend* in his conversations with some of said witnesses stated that he was at one time troubled very much with rats, and that he had provided cats and dogs to destroy

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them, that *God* ordered him to put away all his cats and dogs, that he himself remonstrated and insisted that if he put away his cats and dogs, the rats would eat him up, that *God* thereupon agreed to make a bargain, and did stipulate that if he, *Townshend*, would put away the cats and dogs, he would see that the rats did not do him harm for a certain specified period, that he accordingly did put away his cats and dogs, and *God* did protect him for the stipulated period from any annoyance from the rats. That said *Townshend* stated that he had been present at the judgment of *men*, and that he had seen the different sects come up in order, that he had seen his brother *Bill* amongst the crowd of men there present, and that he had pressed himself so as to be amongst the foremost of the crowd there present, and he was in fact amongst the catholics and episcopalians, but *God* ordered him to go back amongst the methodists. The catholics, episcopalians and some others were allowed to pass on, but when the crowd of methodists came on, *God* caught them by their neck, as persons would catch a flock of goslings, or a number of porter bottles by the neck, and hurled them away off, and they went down out of sight. They also proved by some of the said witnesses, that said *Townshend* represented that at a closely contested election, he had intended to vote the democratic ticket, to which party he professed to belong, and in the success of which party at said election he professed and seemed to have a deep interest, that he stated that he did not vote, and could not vote at said election for said ticket, because as he stated, *God* had commanded him not to do so; that *God* had asked him if he was going to vote for the democrats, and that he, *Townshend*, had stated that he so designed, that *God* then told him, that he himself was a democrat, and had voted the democratic ticket, but that he had determined at that election not to vote at all, that the democrats had become like a saw that had grown dull, and needed filing, and that he meant to let the whigs succeed that year, that they might act as a file upon the saw, and that in consequence of this communication, he actually abstained from voting. The caveators also proved by said witnesses, that

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said *Townshend* professed very frequently to have seen *God* face to face, as a man sees his fellow, that he had talked very frequently with *God*, and had audibly heard *God* speaking to him, that he quarrelled with *God*, and had given back as good as he sent, that he had on one occasion in a dispute between them, struck *God* with a stick, that at one time he was going to camp-meeting, and *God* asked him, “*Jackey* where are you going?” that he had answered that he was going to *Nottingham*, that *God* said he knew better, that he, *Townshend*, was going to camp meeting, that he, *Townshend*, thereupon took the road towards *Nottingham*, and *God* took the road up the creek, and when he, *Townshend*, found that he had outwitted him, he cut across through the woods from the *Nottingham* road to the camp-meeting road, and went to the camp-meeting. The caveators also proved by said witnesses, that said *Townshend* stated that *God* had commanded him to set his negroes free, and to give them all his property, that he had told him this repeatedly, that at one time he, *Townshend*, intended to convey a piece of land to one of his nephews, and that *God* had told him that he must not do so, but must give it to his negroes: these statements were made by said *Townshend* at different times, during many years before the date of his alleged will and afterwards, and that in speaking of his said alleged will, he said that it was not his will, but *God*’s will; that if he could have disposed of his property as he wished, he would have left it to his relations, but that he was not a free agent, that he was a mere overseer, and that he believed his eternal salvation depended on his compliance with the directions he had received; some of the said witnesses stated that said declarations and statements of said *Townshend*, were gravely and seriously made, and apparently with sincerity and under a conviction of their truth, and they stated that they did not consider him a sane man in any matters of religion, and in relation to the disposal of his negroes and other property.

The caveatees on their part, proved by competent witnesses, that the said *John Townshend* was of sound and disposing mind, and capable of making a valid deed or contract, and of

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managing and disposing of his property; that they had known him for many years, one of them having been for many years his family physician, and others having been his near neighbours from early youth; that they had frequently conversed with him and had heard him converse with others. That he devoted much time to the reading of the holy scriptures and thought he was deeply versed therein, and that he was fond of exhibiting his knowledge of religious subjects, and of disputing on such subjects with any who would engage in controversy with him. That his opinions as expressed by him at different times were *entirely* different, and, in said witnesses' opinions, were not seriously entertained by him, but were professed on the occasion for the purpose of disputation, or to excite attention and astonishment; and further proved, that in matters of business, his religious professions did not affect his conduct. And said witnesses, in view of all this knowledge of said *Townshend*, were of opinion that he was of sound and disposing mind, and capable of making a last will and testament, such as is propounded in the cause. And further read to the jury various deeds executed during thirty years preceding the death of said *Townshend*, in which he was either a party grantor or grantee, conveying both real and personal estate. That he was appointed trustee by *Prince George's* county court sitting in equity, and as such trustee conveyed real estate to two of the caveators. That he conveyed property by deed to another of the caveators who also conveyed by deed real estate to him, *Townshend*, in fee. That he had acknowledged a deed conveying real estate before one of the caveators then a justice of the peace. They also read the deed of manumission referred to in the will, executed on the 24th of December 1831, by which he liberated and set free all his negroes, thirty-five in number, naming them and specifying their respective ages, with their increase from and after his death. This deed was duly executed, acknowledged and recorded.

The caveators, in the course of their examination, had proved that *Philemon Chew*, from the year 1815, to the year

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1823, was engaged in business as a merchant at *Nottingham*, in *Prince George's* county, and from 1815 to 1828, was engaged in purchasing tobacco on his own account, or on commission, that from 1815 to 1828, he purchased the tobacco raised by said *Townshend*, and that the latter purchased his annual supplies from said *Chew* during all the time said *Chew* was engaged in business as aforesaid; that said *Chew* and *Townshend* were on intimate terms, and that in December 1831, the said *Chew*, returning from *Annapolis* to *Nottingham* had an interview in this last place with the said *Townshend*; that the said *Townshend* had frequently informed the said *Chew* of his intention to manumit his negroes, and advised with him as to the mode of executing his intention, and that upon the occasion of said interview, the said *Chew* stated to said *Townshend* that it was very probable the legislature, at its then next session, would pass some act affecting the right of the master to manumit his slaves, and advised and urged said *Townshend* forthwith to see the said *John B. Brooke*, his legal counsel, and procure him to prepare a deed of manumission to be executed, so that he, the said *Townshend*, might get ahead of any action of the legislature on the subject, and that in consequence of said information and advice, said *Townshend* did see the said *Brooke*, who prepared said deed of manumission, and the same was executed under the direction and by advice of said *Brooke*.

The caveatees also proved by *James J. Chew*, a competent witness, that he witnessed the execution of the said paper writing as one of the witnesses to the same, that it was executed by the testator in *Upper Marlborough*, in the office of the register of wills of *Prince George's* county, he, the witness, then being a deputy of the register, and it was witnessed by *Philemon Chew*, the register at that time, by *Walter B. C. Worthington*, who was casually present in said office, and by him, the witness; that the will was not read, nor its contents explained, in the hearing of witness; witness signed it at the request of said *Townshend*; *Mr. John B. Brooke* was with *Townshend* at the time; witness had no acquaintance with

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Mr. Townshend at the time, and cannot speak at all as to his mental capacity.

The caveators had before, in their examination of witnesses produced on their part, proved that *Philemon Chew* was a person of high character, and was well acquainted with said *Townshend* for many years, and was his commission merchant for the disposal of his tobacco for many years. And the caveatees proved, without objection on the part of the caveators, that the said *Walter B. C. Worthington* was the partner of said *Philemon Chew*, in the tobacco business, and was a person of high character, and that since the execution of said paper, both said *Philemon Chew* and said *Walter B. C. Worthington* have departed this life. The counsel of the caveatees, in answer to an inquiry as to what use they meant to make of the fact of attestation of said *Chew*, and of said *Worthington* and each or either of them, stated that they meant to rely on said attestation, and each of them, as evidence in the cause, for all purposes for which the same were legally admissible.

The caveators then offered to prove by *Michael B. Carroll*, who had been decided to be a competent witness by the court, to which decision an exception had been taken, that he was well acquainted with the said *Walter B. C. Worthington* in his lifetime; that he had met with said *Worthington* in the town of *Nottingham*, nine miles from *Upper Marlborough*, aforesaid, on the evening of the same day that said paper writing or will was executed, and after the same had been executed, and that said *Worthington* then stated to witness that he had witnessed said will, and that he did not believe said *Townshend* to be, at the time he executed said will, a sane person, and that he had signed said will as a witness, merely to gratify said *Townshend*. It was admitted by the caveators that said *Townshend* was not present when the statements so proposed to be proved, as made by said *Worthington*, were made, and they stated their object to be in offering the said evidence to rely upon the same, if received as evidence before the jury, to rebut the *prima facie* evidence imparted by the attestation of said *Worthington* of the testator's sanity. But the

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caveatees by their counnsel, objected to the said evidence, on the ground that the same was mere hearsay, and not admissible evidence to go to the jury. And the court sustained the objection, and refused to permit said evidence to be given, and excluded the same from the jury. The caveators excepted.

The jury rendered a verdict on all the issues for the caveatees. Whereupon the caveators moved the court to set aside the verdict and grant a new trial for the following reasons.

1st. Because the verdict is against the evidence in the cause.

2nd. Because the verdict is against the weight of evidence in the cause.

3rd. Because at the time of calling the jury and taking the verdict, the foreman in answer to the question as to the finding on the second issue, stated that the jury had not considered and passed upon any of the issues except the first, and thereupon without consideration with his fellow-jurors, rendered a verdict for the caveatees upon all the issues, whereas there was evidence offered at the trial by the caveators, tending to prove other of said issues than the first.

4th. That the court erred in excluding from the jury the evidence offered by the caveators, to be proved by the witness, of the declaration of *Walter B. C. Worthington*, one of the subscribing witnesses to the will, made on the day the said will was signed, impugning the sanity of mind of the said *John Townshend*, at the time of making the said will, and which declarations were offered for the purpose of rebutting the *prima facie* effect of said attestation of said *Worthington*,

The court overruled this motion, and gave judgment against the caveators for costs, and ordered the verdict of the jury to be certified to the orphans court, &c. The caveators appealed.

The cause was argued before SPENCE, MARTIN and FRICK, J.

TUCK and CAUSEN for the appellants, upon the question of jurisdiction, contended:

1st. That independent of the act of 1804, ch. 55, confirmed by the act of 1805, ch. 16, the county courts of the

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several judicial districts of the State, have no authority to direct the removal of cases to any other county court.

2nd. That the provisions of the said acts authorising removals, do not embrace the case of issues sent from the orphans courts to the county courts for trial, that therefore *Anne Arundel* county court erred in assuming jurisdiction on the case.

Upon the point raised in the bill of exceptions, they contended that the court erred in refusing to permit the declarations of *Worthington* to be given to the jury.

1st. Because the fact of attestation *involves* the inference of sanity of the testator at the time of the executing of the will.

2nd. Because in the event that the witness was living at the time of trial, it would have been competent for the caveators in the court below, to have rebutted such inference by the testimony of the attesting witness himself.

3rd. That the fact of the death of the witness, should not, in this particular, prejudice the appellants, because the attestation may be regarded as merely a presumed declaration of his opinion of the testator's sanity, and in such view, the declarations offered below were of equivalent force, and should have been submitted to the jury to be weighed by them.

4th. Because if the attesting witness had been alive, and upon examination had declared his belief in the sanity of the testator at the time of attestation, it would have been competent for the caveators below, to have offered the declarations in question, in order to contradict said witness and destroy the force of his opinion, and that the attestation taking the place of such oral declarations, should, on principle, and for purposes of justice, be liable to a similar rebuttal. And the more especially, as in this case the counsel for the caveatees stated, that they should so use the evidence of attestation before the jury.

PRATT and ALEXANDER, for the appellees, insisted:

1st. That the proceedings were properly removed from *Prince George's* county court to *Anne Arundel* county court, for trial. That those issues are not a *suit* or *action at law*,

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commenced or instituted in *Prince George's* county court, within the provisions of the constitutional act of 1804, ch. 55, sec. 2. And that even in reference to suits and actions at law, the act of 1849, ch. 518, in so far as it authorises a removal to any adjoining county, is a *further* remedy, and is therefore warranted by the said act of 1804,

2nd. That the motion for a new trial, and especially upon the ground covered by the bill of exceptions, was a waiver of said bill of exceptions.

3rd. That the declarations of *Walter B. C. Worthington*, tendered in evidence, as shown in the appellant's exception, would have been inadmissible, even if it had been proposed to prove them by a competent witness.

4th. That *Michael B. Carroll*, the witness, tendered to prove said declarations, was interested in the event of this suit, and therefore incompetent as a witness, to prove the same.

MARTIN, J. dissented, and delivered the following opinion:

In this case I dissent from that part of the opinion of a majority of the court, in which it is held that the declarations of *Walter B. C. Worthington*, were admissible in evidence. The true doctrine on the question of the admissibility of these declarations, is to be found, I think, in the opinion of the court of exchequer, in the case of *Stobart vs. Dryden*, 1 *Mees. and Welsby*, 614.

FRICK, J., delivered the opinion of this court.

In this case we think the court properly overruled the motion to remand it to *Prince George's* county court; and the majority of the court are of opinion that the declarations of *Walter B. C. Worthington*, were properly admissible in evidence, and that consequently the court erred in excluding them from the jury. The question is not clearly settled by the books, but the weight of authority, they think, is decidedly in favor of this decision. The only case referred to by counsel, or that we can find which would seem to impeach it, is the case of

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Stobart vs. Dryden, 1 *Mees. and Welsby*, 614, where it was held that the defendant could not give evidence of the declaration of a deceased witness, tending to show that he had forged or fraudulently altered the deed. The general rule in exclusion of hearsay testimony, is not to be questioned; but in this very case here referred to, the inquiry was, whether it was or not, one of the exceptions to the rule, always recognized upon the ground of necessity or convenience? Now in the case before us, where the attestation of the witness, (now dead,) imparts all that is requisite to make the will good and valid, so far as his signature can go, not only convenience and necessity, but justice would seem to require that his declarations, (in this case almost simultaneous with the act,) should be admitted to impeach these presumptions of law. And in looking upon this as an exception to the general rule, we think we are supported by the cases of *Wright and Littler*, 3 *Burr.*, 1255. *Doe vs. Ridgeway*, 4 *Burn. and Ald.*, 55. *Walker vs. Stephenson*, 3 *Esp.*, 284, recognized by *Lord Ellenborough*, in 6 *East.*, 195. 5 *Bing.*, 435. 2 *Bailey S. C. Rep.*, 128. 3 *Yeates*, 506. 2. *Hill. Rep.*, 609. 2 *Paige*, 147. 1 *Harrington*, 109, and 9 *Barr. Penn. Rep.*, 151, *Harden vs. Hays*.

For the purposes of this opinion, the court think that *Carroll* is to be considered a competent witness to prove such declarations, the court below having so ruled, and there being no appeal by the appellees from their decision. The judgment is therefore reversed, and procedendo awarded.

JUDGMENT REVERSED, AND
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 1849, chap. 88. Relating to appeals in insolvent proceedings, 455.
 1848, chap. 518. Authorising removals to an adjoining county, 518.
 See CONSTRUCTION OF ACTS AND STATUTES.

ACTS OF CONGRESS.

General bankrupt act of 1841. See BANKRUPTS.

ADMISSIONS.

See DECLARATIONS AND ADMISSIONS.

ADMINISTRATION.

1. An intestate died leaving a brother and three sisters. The oldest sister, who was also older than the brother, was unmarried. The other sisters were married. HELD: That the eldest sister was entitled to administration upon the estate, and could only be excluded upon the representation or impression of an indefinite absence from the State. *Owings vs. Bates*, 463.
2. The husband of one of the unmarried sisters has no right to supersede the eldest sister in her rightful claim to the administration, without the consent, or without notice to the other parties. *Ib.*
- 3 Where a distributee stands in the relation both of debtor and creditor to the estate, and there are other parties who are entitled to administer, it would be derogatory to sound principles of justice to commit the administration of the estate to him. *Ib.*
4. It was agreed, at an interview between all the distributees, that the eldest sister, the one entitled to administration, should administer the estate, the husband of one of the younger sisters being at the time present, and disclaiming all right or intention to apply for the administration. On the 26th of December, the eldest sister left the State on a temporary sojourn in the *District of Columbia*, with the intention, expressed and understood, of returning within the ensuing month to apply for the administration. On the 6th of January following, the said husband of the younger sister, without notice to, or consent of, the other parties, applied for and obtained the administration. HELD: That under these circumstances, the grant of letters to him was premature and improvident, and should be revoked. *Ib.*

See ORPHANS COURT, 14 to 16.

ADMINISTRATION, LETTERS OF, &c.

See ORPHANS COURT, 14 to 16.

ADMINISTRATOR AD COLLIGENDUM.

See ORPHANS COURT, 7, 15.

ADMINISTRATORS AND EXECUTORS.

See ORPHANS COURT.

TROVER, 13.

ADOPTION.

See WILL AND TESTAMENT, 2, 3.

PRACTICE, 13.

ADVANCEMENT.

1. A father purchased land and paid for it with his own money, but had the title conveyed to his son, who entered into possession and disposed of it as his own property. **Held:** that the money advanced, being for the purchase of land, must be treated as land, and this transaction must be regarded as an advancement in real estate. *Hayden vs. Burch, et al.*, 79,

See HOTCHPOT.

ADVERSE POSSESSION.

1. The title to lands draws to it the seizin, so that one who has title, is, by force of his title, in possession, until an ouster or disseizin is committed upon him by some one entering upon the land, with a claim of adverse possession. *Cresap's Lessee, vs. Hutson*, 261.
2. Where a person claims by possession only, without showing any title he must show an exclusive, adverse possession, by enclosure, and his claim cannot extend beyond his enclosure. *Ib.*
3. There must be a real and substantial enclosure, an actual occupancy, or *possessio pedis*, which is definite, positive and notorious, to countervail the legal title. *Ib.*
4. No adverse possession short of twenty years, will destroy the legal title. *Ib.*
5. The deed of a plaintiff in ejectment, conveying the lands in dispute, made after commencement of the suit, is not void, because the defendant, at the date of its execution, held adverse possession of the land. *Ib.*
6. Two brothers, whose farms adjoined, were both mistaken about their division line. **Held:** That this mistake could not affect the title of either. And the one who held over on the other, cannot claim adverse possession, because, he and the real owner supposed the division line to run in a different direction: neither held adversely to the other. *Ib.*
7. A defence on warrant, is not necessarily a defence by adverse possession. *Ib.*
8. A defendant, at first, took defence on warrant for the whole land in dispute, which he afterwards abandoned as to part. **Held**, that the plaintiff could not make use of the first defence, in order to show adverse possession of the whole in the defendant. *Ib.*

AGREEMENT.

See CONTRACT, CONSTRUCTION OF, &c.

PRINCIPAL AND SURETY.

BILLS OF EXCHANGE, &c., 8, 9.

ANIMUS TESTANDI.

See WILL AND TESTAMENT, 1.

ANNUITY.

See DOWER, 7, 8.

APPEAL.

1. By the true construction of the act of 1837, ch. 259, sec. 2, provision is made for an appeal from the decisions of the commissioners of Baltimore county, in regard to the opening and shutting up of public roads in said county, to Baltimore county court, but no appeal lies to this court, from the decisions of said county court in such cases. *Webster vs. Cockey, et al.*, 92.
2. If no right of appeal were conferred on the county court in such cases, its judgments unwarrantably pronounced on the subject, might by appeal be reviewed and reversed in this court. *Ib.*
3. From a special limited jurisdiction no appeal will lie, unless specially provided by legislative enactment. *Ib.*
4. The act of 1849, chap, 88, granting appeals to this court, in cases of insolvent proceedings, applies to *Howard* district court, as well as to the county courts. This act is a remedial law, and is to be liberally construed. *Baylies and Tyson, vs. Ellicott*, 452.

See ORPHANS COURT, 14 to 16.

PRACTICE IN THE COURT OF APPEALS.

ARBITRATION—ARBITRATORS.

See AWARD.

ASSAULT AND BATTERY.

See PLEAS AND PLEADING, 10.

ASSENT.

See PRINCIPAL AND SURETY, 4 to 8.

ASSETS.

See PRACTICE IN CHANCERY, 18.

ASSIGNMENT, ASSIGNOR AND ASSIGNEE.

1. A covenant for the quiet enjoyment of lands, cannot be assigned under the act of 1829, ch. 51, so as to authorise the assignee to sue for a breach of it. That act authorises the assignments of judgments, bonds, specialties, or other *choses in action* for the payment of money, and not stipulations to do or not to do some act or duty. *Dakin and Pomeroy vs. Craft*, 1.
- 2 The assignment of such a covenant made in respect to lands in *New York* cannot be used as a set off in *Maryland*. *Ib.*
3. Such a covenant cannot well be separated from the deed of which it is a part, and an assignment of it to a person who had no interest in the land, will not entitle the assignee to institute suit upon it in his own name, or to use such assignment as a set off. *Ib.*
4. On the day after the sale, the mortgagee executed an assignment of his interest in the mortgage, to a third party. HELD, that this did not give to the assignee a right to sue, in an action of assumpsit, in his own name: this action must be instituted in the name of the mortgagee, the party by whose authority the sale, to be a legal one, must have been made at the time it was made. *Leighton vs. Preston, et al.*, 201.

ASSIGNMENT, ASSIGNOR AND ASSIGNEE.—*Continued.*

See MISTAKE, 3.

INSOLVENT DEBTOR, 4 to 8.

FRAUDULENT CONVEYANCES,

CONVEYANCES, CONSTRUCTION OF, &c.

BANKRUPTS.

ASSUMPSIT.

1. Where the endorser of a promissory note was sued by the holder, and had paid but *part* of the judgment recovered against him on the note, it was HELD: That he could maintain an action of *assumpsit* against the maker for the part so paid, and that against such an action, the statute of limitations begins to run from the time he money was paid, and not from the maturity of the note. *Bullock vs. Campbell*, 182.
2. Certain goods were mortgaged by the owners, to the plaintiff, to secure a debt due from the former to the latter. The mortgagors afterwards conveyed the same goods to the defendants, in trust to sell and distribute the proceeds among the creditors of the grantors. The defendants under this deed of trust, sold the goods, and received the proceeds. HELD: That in making this sale the defendants committed a tort, for which they would be answerable in damages, to the plaintiff, who could either sue for the tort, or waive it and claim the proceeds, to satisfy his mortgage debt, in an action for money had and received. *Leighton vs. Preston, et al.*, 201.
3. On the day after the sale, the mortgagee executed an assignment of his interest in the mortgage, to a third party. HELD, that this did not give to the assignee a right to sue, in an action of *assumpsit*, in his own name: this action must be instituted in the name of the mortgagee, the party by whose authority the sale, to be a legal one, must have been made at the time it was made. *Ib.*
4. The plaintiff made a contract with defendants for grading a section of rail road, to be completed by the 1st of October, 1845. By this contract monthly estimates were to be made by the defendant's agent, of the quantity and value of the work done during the month, *four-fifths* of which value was to be paid to the plaintiff immediately, and the balance on completion of the work, said estimates to be conclusive between the parties. If the plaintiff failed to comply with all its terms, or if it should appear to their agent that the work does not progress with sufficient speed, the defendants may annul the contract, upon giving to the plaintiff *three days' notice* in writing to that effect, in which case the plaintiff was to forfeit the unpaid value of the work done. This right to annul was not to be *mutual*, but to be exercised by defendants only. Estimates and payments abating the one fifth were made up to the 29th of October, 1845, and the work was prosecuted by plaintiff until the 6th of November following, when defendants, *without notice*, entered upon and expelled the plaintiff from the work. HELD: that by this act the defen-

ASSUMPSIT.—Continued.

dants annulled the contract, and thereby released the plaintiff, and he may sue in general *assumpsit* for the value of the work actually done, and is not bound to resort to his special action on the contract.

Rodemer vs. Hazlehurst & Co. 288.

5. Where there is a special contract and the plaintiff has performed a part of it according to its terms, and is prevented by the act or consent of the defendant from performing the residue, he may recover in general *assumpsit* for the work actually done, and the defendant cannot set up the special contract to defeat him. *Ib.*
6. Putting an end to a contract by one party is an abandonment of it by him, and if his acts in so doing are such as necessarily to prevent a performance on the part of the other, the whole contract is rescinded, and the other party may resort to his *quantum meruit*. *Ib.*
7. Where a contract contains a number of distinct stipulations, which admit of being separately executed and closed, each is taken distributively, and considered as forming the matter of a separate agreement after it is so closed. *Ib.*
8. In this case the plaintiff is concluded by the monthly settlements, and by reason of their being closed as distinct and separate portions of the contract, he cannot open them again to prove and recover the actual value of the work. *Ib.*
9. These partial payments bind him to the whole settlement, and so far as the work has been adjusted under the contract he can recover only the balance due upon the basis of these settlements, including the one-fifth reserved for ulterior settlement. *Ib.*
10. The defendants by their own acts depriving the plaintiff of the means and opportunity to comply with the contract, have released all claim to the forfeiture mentioned in the agreement. *Ib.*
11. So far as work has been performed which remains unadjusted between the parties by the monthly estimates, the plaintiff is not bound by the contract, but is at large upon his *quantum meruit* and may prove the actual value of the work. *Ib.*

See PRACTICE.

ATTACHMENT.

1. The 2nd section of the act of 1825, ch. 114, gives no authority to clerks of county courts, to issue attachments on judgments of justices of the peace, unless the plaintiff produces the original judgment or a copy thereof under the hand and seal of the justice who rendered the same. *Rodemer vs. Detmold*, 249.]

ATTESTATION OF WILLS.

See EVIDENCE, 46, 37.

ATTORNEY.

See EVIDENCE, 18, 34.

AWARD.

1. Where arbitrators mistake the law, and by reason of this mistake have given an award in favor of one of the parties, and this fact

AWARD.—Continued.

be shown by the award itself, the county court has the power and is bound to set aside such award. *State use of Calvert, vs. Williams*, 172.

BANKRUPTS.

1. Though the provisions of the bankrupt law of this country are different from the bankrupt law of *England*, yet here, equally strict proof of the assignee's title to sue is required. *Hall vs. Sewell*, 146.
2. The plaintiff, in proof of his title to sue in the courts of this State, as assignee of a bankrupt, and of his appointment as such assignee under the act of Congress of 1841, offered the proceedings of the circuit court of the *District of Columbia*, sitting in bankruptcy, upon the application of the bankrupt. **Held:** That the courts of *Maryland* have a right to examine into the validity of these proceedings, and to judge of the sufficiency of such appointment. *Ib.*
3. The bankrupt law requires the assignee to give bond, and the same proof is required of his right to sue as assignee, as is required of a trustee of an insolvent debtor, appointed under our insolvent laws. *Ib.*
4. The appointment of the plaintiff as *general assignee* in bankruptcy, for the county of *Washington, D. C.*, is not such an appointment as is required by the act of Congress, to vest the property of the bankrupt in the plaintiff; and no proof being offered of his having given bond as special assignee, he cannot maintain this suit. *Ib.*

See **INSOLVENT DEBTOR**.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A *bona fide* holder of a negotiable note for a valuable consideration, without notice of facts which affect its validity as between antecedent parties, if he takes it by endorsement before it becomes due, acquires a valid title and may recover upon it, although, as between antecedent parties, the transaction may be invalid. *Gwynn & Co., vs. Lee, et al.*, 137.
2. The defendant received a negotiable note, as security for the payment of money borrowed at the time, of him, by the endorers of the note, without notice that it had been fraudulently obtained from the makers. **Held**, that he could recover upon it. *Ib.*
3. Before the makers can ask relief in equity against such a note, they must show that they have a defence of which they cannot avail themselves at law. *Ib.*
4. The defendant is not bound to exhaust his remedies against other securities, placed in his hands at the same time for the same debt, before he can enforce payment of such note. *Ib.*
5. It is no defence that the debt for which the note was pledged as security was tainted with usury; the makers of the note cannot, for this reason, avoid the contract. *Ib.*
6. A promissory note was drawn by the maker payable to the order of

BILLS OF EXCHANGE, &c.—*Continued.*

the plaintiff the holder "negotiable and payable at the *Cumberland Bank of Allegany*." Upon the back of this the names of the defendants were written. **HELD:** That this note itself is not *prima facie* evidence that the defendants placed their names upon it as makers or original promissors and not as endorsers. *Hoffman & Rizer vs. Coombs*, 284.

7. It is *prima facie* a note to be offered for discount at bank, and not elsewhere, and is made payable to the plaintiff, in order that he may become the first endorser. *Ib.*
8. A holder of a note which had been duly protested, and the liability of the endorser fixed by due notice, agreed with the maker to divide the amount of the note into three sums, for each of which a draft was to be drawn by the endorser upon the maker, in favor of the holder, payable on time, on the receipt of which drafts, accepted by the maker, the holder agreed to deliver up the note to be canceled. The endorser assented to this agreement, and signed the drafts which were sent to him by the maker by whom they were subsequently accepted and delivered to the clerk of the holder, who (the clerk) thereupon informed the maker he could have the note whenever he called for it. Afterwards the holder finding that these drafts were not on stamped paper, informed the maker of the note of this fact, and told him he should expect other drafts, but gave no such notice to the endorser. No other drafts were given, and the note was never delivered up. **HELD:** That the delivery of these unstamped drafts by the maker to the clerk of the holder, was not such a performance of the agreement as to discharge the endorser from liability on the note. *Williams vs. Hall*, 347.
9. It was not, under this agreement, the duty of the holder to have the drafts stamped after they came to his possession, by complying with the provisions of the act of 1844, ch. 28, sec. 8. *Ib.*
10. A bill of exchange was not presented for payment, nor protested, until four days after its maturity. **HELD:** That this presentment was not within a reasonable time, and the drawers were discharged. *Orear & Berkley vs. McDonald, et al.*, 350.
11. Whether the circumstances of any particular case are sufficient to dispense with demand and notice, is always a question of law, addressed to the judgment of the court. *Ib.*
12. If the facts on which this question arises be admitted, or undeniable, then it is exclusively a matter of law, to be pronounced by the court, but if the facts be controverted, or the proof be equivocal or contradictory, then the court hypothetically instruct the jury as to the law. *Ib.*
13. If the drawer had no effects in the hands of the drawee, from the time the bill was drawn until it became due, he is liable without proof of demand and notice. *Ib.*
14. But where the drawee has something equivalent to effects, or has made an express or implied agreement to accept and pay, or the

BILLS OF EXCHANGE, &c.—Continued.

drawer has any reasonable expectation that the bill will be accepted and paid, he is entitled to demand and notice. *Ib.*

15. The reasonable grounds required, are not such as would excite an idle hope or wild expectation, or a remote probability that the bill will be paid, but such as create a full expectation, a strong probability of its payment; such as would induce a merchant of common prudence and ordinary regard for his commercial credit, to draw a like bill. *Ib.*

16. There is no such stringent rule, as to require the drawee to have funds of the drawer in hand, at the maturity of the bill, sufficient for its payment, in order to entitle the latter to demand and notice. *Ib.*

17. If the drawer, at the time the bill should have been presented, had the right to expect, reasoning upon the state of facts connected with the transactions as they then existed between him and the drawee, that his bill would be honored, he is entitled to demand and notice. *Ib.*

18. The insolvency of the drawee, furnishes no excuse for the neglect of the holder, to demand payment and give notice of non-payment. *Ib.*

19. A bill for \$3000 was drawn under the authority and assent of the drawees, upon the faith of consignments, to be made to them by the drawers. The drawees were advised of the draft and of a particular consignment to meet it, and they promised to honor it when presented. The consignment was received by the drawers, and disposed of for \$7000, before the maturity of the draft. Other consignments were afterwards made and other drafts drawn and accepted, so that at the maturity of the bill, the drawees had not funds sufficient to pay it, after the payment of drafts subsequently drawn and accepted. **HELD:** That under these circumstances, the drawers were entitled to demand and notice. *Ib.*

20. The laches of the holders discharged the drawers; and the bill cannot be given in evidence on the counts, for money had and received. *Ib.*

See PRACTICE, 29, 30, 31.

NUDUM PACTUM.

BILL OF DISCOVERY.

See PRACTICE IN CHANCERY, 34.

BILL OF RIGHTS.

See CONSTITUTIONAL LAW, 7.

BILL OF SALE.

See CONSTRUCTION OF ACTS, &c. 33.

CASES OVERRULED OR EXPLAINED.

1. The cases of *Dallam vs. Dallam*, 7 H. & J., 240. *Newton vs. Griffith*, 1 H. & G., 111, and *Briscoe vs. Briscoe*, 6 G. & J., 232, examined and explained in certain particulars. *Edelen vs. Middleton*, 161.

CASES OVERRULED OR EXPLAINED.—*Continued.*

2. The circumstances of this case, distinguished from those of *Dulany vs. Hoffman*, 7 G. & J., 170. *Beatty vs. Davis*, 211.
3. The case of *Sellman vs. Bowen*, 8 G. & J., overrules the case of *Steiger's Adm'r, vs. Hillen*, 5 G. & J., 121, only in so far as the latter case, countenances the doctrine, that a widow may, *at law*, recover from the alienee of her husband, damages for the detention of her dower. *Chew exc'r of Gibson, vs. The Farmers Bank, et al.*, 361.
4. Nothing else in the case of *Steiger's Adm'r, vs. Hillen*, is questioned; and that case, so far as the law relating to laches and lapse of time is concerned, is affirmed by the case of *Kiddall vs. Trimble, Exc'r of Jacob*, 8 Gill, 507, and by this case; such ought now to be considered settled law in *Maryland*. *Ib.*

CAVEAT TO WILLS.

See ORPHANS COURT, 7, 9, 17, 18, 19.

REMOVAL OF CASES.

CHAMPERTY.

See DEEDS, &c., 5.

CHARTER, FORFEITURE OF.

See CORPORATIONS.

CHOSE IN ACTION.

See ASSIGNMENTS, 1.

CO-HEIRS.

See COPARCENERS.

COMMISSIONS TO EXECUTORS.

See ORPHANS COURT, 19.

COMMISSIONS TO TAKE TESTIMONY.

See PRACTICE IN CHANCERY, 9 to 13.

CONSIDERATION.

See SPECIFIC EXECUTION, &c., 3.

CONSTITUTION OF THE UNITED STATES.

See CONSTITUTIONAL LAW, 3, 5, 6, 8.

CONSTITUTIONAL LAW.

1. The act of 1845, chap. 352, which declares, "that in any suit or action hereafter to be brought in any court of law or equity in this State, upon any bond or contract," &c., the party who seeks to plead the usury act of 1704, must specially plead the same, and set out in his plea the sum actually due, with legal interest, is retroactive as to contracts made before its passage, and is not for this reason unconstitutional or void. *Baughner, et al., vs. Nelson*, 299.
2. It is incumbent on those who assail a statute on the ground of its invalidity to make out a clear case of legislative usurpation. *Ib.*
3. An *ex post facto* law, within the meaning of the constitution of the *United States*, relates to crimes, and has no application to private rights or civil remedies. *Ib.*

CONSTITUTIONAL LAW.—*Continued.*

4. The act of 1845, cannot be regarded as violating the obligation of any contract, so far as it operates upon the contract of loan, it upholds and sustains it in part. *Ib.*
5. A State law, though it may divest, by its retroactive operation, vested rights, is not for this reason to be treated as an infraction of the constitution of the *United States*. *Ib.*
6. The constitution of the *United States* does not prohibit the States from passing retrospective laws generally, but only *ex post facto* laws, and laws impairing the obligation of contracts. *Ib.*
7. The 15th article of the bill of rights of this State only forbids retrospective criminal laws, meaning *ex post facto* laws, and is a recognition of the right of the legislature to pass retrospective laws relating to civil cases and contracts. *Ib.*
8. A statute which by its retrospective operation divests vested and valuable rights, is, in the absence of any express prohibition in the constitution of the *United States*, or of this State, unauthorised and void, as arbitrary and violatory of the first rules of right and justice, and contrary to the fundamental principles of the social compact. *Ib.*
9. The act of 1845, only compels the borrower, who, as a *defendant*, seeks to protect himself against a usurious contract, to do precisely what he was before obliged to do when he stood in the position of *plaintiff*. *Ib.*
10. In this view the act is plainly remedial, the exercise of legislative authority over the subject of remedies, a power which unquestionably may be exercised at pleasure, in relation to past as well as future contracts. *Ib.*
11. An act which divests a right through the instrumentality of the remedy, and under the pretence of regulating it, is as objectionable as if aimed at the right itself. *Ib.*
12. But the vested rights thus guarded are those only to which a party may adhere, and upon which he may insist without violating any principle of sound morality; there can be no vested right to do a wrong, or violate a moral duty, or resist the performance of a moral obligation. *Ib.*
13. The act of 1845, chap. 352, is free from objection, and is to be enforced as a valid exercise of legislative power. *Ib.*

CONSTRUCTION OF ACTS AND STATUTES.

1. A covenant for the quiet enjoyment of lands, cannot be assigned under the act of 1829, ch. 51, so as to authorise the assignee to sue for a breach of it. That act authorises the assignments of judgments, bonds, specialities, or other *choses in action* for the *payment of money*, and not stipulations to do or not do some act or duty. *Dakin vs. Pomeroy & Crafts*, 1.
2. The act of 1826, ch 247, does not dispense with the necessity of a full record, as evidence of a judgment in any case, in which, before that act, a full record was necessary. *Mitchell's, Adm'r vs. Williamson's Exc'rs*, 71.

CONSTRUCTION OF ACTS AND STATUTES.—*Continued.*

3. The provision of the act of 1798, which requires the settlement or portion advanced in the lifetime of the intestate, to be brought into *hotchpot*, can be applied only to a case of total intestacy. *Hayden vs. Burch, et al.*, 79.
4. Under the fifth section of the act of 1805, ch. 110, no more of a devise or bequest to an insolvent could be obtained by creditors, than could have been obtained by them if no insolvent discharge had intervened. The devise vested not in the trustee, but remained in the insolvent debtor, subject to the race of diligence on the part of his creditors. *Smith and Talbot vs. Donnell*, 84.
5. The second section of the act of 1834, ch. 293, designed to accomplish nothing but to put an end to this race of diligence amongst creditors, by transferring to the trustee such rights as would otherwise have remained in the insolvent, and thus secure an equal distribution of his property. *Ib.*
6. Where a *caveat* is filed *after* the will is admitted to probate, and letters testamentary granted to the executors, authority in the orphans court to allow such executors counsel fees to resist the *caveat*, is expressly granted by the act of 1798, ch. 101, sub-ch. 10, sec. 2. *Townshend vs. Brooke*, 90.
7. By the true construction of the act of 1837, ch. 259, sec. 2, provision is made for an appeal from the decisions of the commissioners of *Baltimore* county, in regard to the opening and shutting up of public roads in said county, to *Baltimore* county court, but no appeal lies to this court from the decisions of said county court in such cases. *Webster, et al., vs. Cockey, et al.*, 92.
8. The acts of Assembly of this state authorise the maintenance of an action of *trover* against administrators for a conversion by their intestate. *Brumnett vs. Golden's Adm's*, 95.
9. The 52nd sec. of the act of 1841, ch. 23, does not prohibit the levying of the State tax at any other period than that at which the county tax was imposed. This section is imperative only so far as to prohibit the levy of the county tax, unless the State assessment be first provided for, and this may be done either before or at the time of the levy of the county tax. *State vs. Milburn, et al.*, 97.
10. The 15th section of the act of 1843, ch. 208, is applicable only to the mode in which the State and county taxes are to be collected, and in this respect alone, repeals the 52nd section of the act of 1841, ch. 23. *Ib.*
11. Under the act of 1841, ch. 23, as it now stands, an assessment by the local tribunals for county or city purposes, is unauthorised and void, unless before or at the time of levying the county tax, a tax for the State be laid, as required by the acts of Assembly, applicable to the subject. *Ib.*
12. It is a general rule in the interpretation of legislative acts, not to construe them to embrace the sovereign power of government,

CONSTRUCTION OF ACTS AND STATUTES.—*Continued.*

unless expressly named or included by necessary implication. *State vs. Milburn*, 105.

13. The general words of a statute ought not to include the government, or affect its rights, unless the construction be clear and indisputable upon the text of the act. *Ib.*
14. In construing statutes, the real intent, when ascertained, will always prevail over the literal sense of the terms. If the words do not exclude doubt, the intention is to be collected from the occasion and necessity of the law. *Ib.*
15. It was not the intent of the legislature, by the act of 1845, ch. 193, to avoid bonds, *given directly to the State*, unless they were stamped, and the State may maintain an action on such a bond, although it be not on stamped paper. *Ib.*
16. By the act of 1796, ch. 67, sec. 21, the county court of that county in which the petitioner or petitioners shall reside, under the direction of his, her or their master or mistress, or owner, are exclusively vested with the power of trying the petition for freedom. *Anderson vs. Garrett*, 120.
17. Upon a suggestion for the removal of a petition for freedom, under the 3rd section of the act of 1810, ch. 63, the county court in determining on the sufficiency of the suggestion, is confined to the competent testimony offered in its support, and cannot receive any evidence offered by the opposite party. *Ib.*
18. The clause of this act which requires the petitioner to be "actually held in bondage" by the person claiming to be owner, and asking for the removal, means a holding in bondage, *in point of fact*, and not a mere legal or constructive holding. *Ib.*
19. Before the act of 1845, ch. 352, if the debtor, or any person who had a right to represent him, asked in chancery to be relieved from the payment of any usurious debt, the principal and legal interest must be paid. *Gwynn & Co., vs. Lee, et al.*, 137.
20. This act will not permit any person to avoid the contract in any suit, whether in law or in equity; the principal and legal interest are still due and to be paid, and the creditor is entitled to all the securities which he has, just as if, by the original terms of the contract, it had been to pay the principal, with legal interest. *Ib.*
21. A judgment was obtained by the plaintiff upon default of the defendant to answer certain interrogatories filed by defendant, and a writ of inquiry ordered. Upon motion and affidavit of defendant's counsel, alleging surprise in obtaining this judgment, the court ordered it to be stricken out. **Held:** that the power of the court to strike out this interlocutory decree or judgment, is given by the act of 1787, ch. 9, sec. 6. *Hall vs. Sewell*, 146.
22. The act of 1825, chap. 117, does not apply to demurrers, or motions in arrest of judgment, because these objections being to the pleadings, the whole record is before this court, and the whole is examined to arrive at the proper objections. *Cushwa vs. Cushwa*, 242.

CONSTRUCTION OF ACTS AND STATUTES—*Continued.*

23. The 2nd section of the act of 1825, ch. 114, gives no authority to clerks of county courts, to issue attachments on judgments of justices of the peace, unless the plaintiff produces the original judgment or a copy thereof under the hand and seal of the justice who rendered the same. *Rodemer vs. Detmold*, 249.
24. Where an objection is taken to the admissibility of evidence generally, this court is not prevented by the act of 1825, ch. 117, from examining the pleadings, because the admissibility of the evidence is entirely dependent upon them. *Marshall vs. Haney*, 251.
25. In all cases susceptible of doubt and where a statute is open to interpretation it is to be construed to operate prospectively, but where a statute either by express provision or necessary implication is retroactive the rule does not apply. *Baughner, et al., vs. Nelson*, 299.
26. The act of 1845, ch. 352, which declares "that in any suit or action hereafter to be brought in any court of law or equity in this State, upon any bond or contract," &c, the party who seeks to plead the usury act of 1704, must specially plead the same, and set out in his plea the sum actually due with legal interest, is retroactive as to contracts made before its passage, and is not for this reason unconstitutional or void. *Ib.*
27. The act of 1845, cannot be regarded as violating the obligation of any contract: so far as it operates upon the contract of loan, it upholds and sustains it in part. *Ib.*
28. Under the act of 1704, a party could in equity obtain relief against an usurious contract only by paying or offering to pay the principal sum with legal interest. *Ib.*
29. Neither could the borrower maintain an action of trover at law, under this act of 1704, to recover goods hypothecated to secure an usurious debt, unless he tendered the amount actually loaned. *Ib.*
30. The act of 1845, only compels the borrower who as a defendant seeks to protect himself against a usurious contract, to do precisely what he was before obliged to do when he stood in the position of plaintiff. *Ib.*
31. The act of 1845. ch. 352, is free from objection, and is to be enforced as a valid exercise of legislative power. *Ib.*
32. Where the title to a negro accrues by forfeiture under the act of 1817, ch. 112, notice or knowledge to the reversioner is not necessary in order to bar his claim by the right of possession. *Clarke's, Adm'r vs. Marriott's Adm'r*, 331.
33. Where the owner of a slave for life transfers to a vendee an interest for a term of years in the negro, such a disposition of a slave for life, is not within the provisions or the spirit of the act of 1817, ch. 112. *Ib.*
34. By the act of 1836, ch. 128, sec. 2, a complainant has authority under the commission in chief, to take all the testimony necessary to sustain his case, as well against defaulting as other defendants, and

CONSTRUCTION OF ACTS AND STATUTES—*Continued.*

such commission dispenses with the execution of an *ex parte* commission issued under the act of 1820, ch. 161. *Higgins, et al., vs. Horwitz*, 341.

35. Where an infant answers by guardian, admitting the facts stated in the bill or making no defence, the act of 1836, ch. 128, sec. 1 connects and binds the interest and defence of such infant with that of the other defendants, and the evidence taken for the complainant under a commission issued in due form, necessarily operates against all the defendants. *Ib.*
36. This act of 1836 assumes for the court the duty to see, that no substantial rights of the infant are injuriously affected by the proceedings under the commission, and in the cause. *Ib.*
37. Whether notice of the execution of a commission be served on the guardian to the infant or his solicitor, it is in view of the act of 1835, surplusage, and can vitiate nothing that is presumed to have been done under it. *Ib.*
38. The act of 1839, ch. 217, and its supplements, incorporating the "*Frederick Female Seminary*," do not constitute the "board of commissioners" therein named, a corporate body. *Board of Commissioners for The Frederick Female Seminary vs. The State*, 379.
39. By this act of 1839, the board of trustees, which was to come into existence by the 5th and 6th sections of that act, is the body corporate, thereby created, under the name and style of "The Trustees of the *Frederick Female Seminary*." *Ib.*
40. It was not necessary that all the duties of the board of commissioners, should be performed, before the board of trustees could organise and open the school. *Ib.*
41. The duties to be performed by the board of commissioners, did not require a corporate existence, and for any omission of their duty, or wrongful and injurious acts, their bond given, as required by the 2nd section of the act of 1839, was answerable, and not the charter of the board of trustees. *Ib.*
42. The duration of the existence of the board of commissioners, in the absence of a period fixed by the act of Assembly, is determined by the duties, for the performance of which it was created. *Ib.*
43. These two boards, of commissioners, and trustees, may exist at the same time, and a member of one, may at the same time be a member of the other. *Ib.*
44. Every allegation or matter affirmed in the preamble to an act or resolution of the legislature, is not to be considered as incontrovertible. *Ib.*
45. The board of commissioners were authorised to become a board of trustees, after the grounds were purchased, and the necessary buildings and improvements were erected thereon, and their doing this, and opening and organising a school, before the whole proceeds of the lottery grants had been received, and all the duties of the board

CONSTRUCTION OF ACTS AND STATUTES.—*Continued.*

- of commissioners had been performed, was no violation of their charter. *Ib.*
46. It was their duty under the charter, to open the school as soon as they possibly could, after the grounds were purchased and paid for, and the building ready to receive students. *Ib.*
47. The act of 1845, chap. 76, authorising the attorney general to institute proceedings against the board of commissioners for the *Frederick Female Seminary*, to inquire whether the charter and franchises of said board, ought not to be annulled by reason of abuser thereof, only authorised charges of abuse of franchise, and did not authorise any inquiry touching the breaches alleged in the *scire facias* in this case. *Ib.*
48. That act did not authorise any proceedings against the four additional commissioners, appointed by the act of 1844, chap. 27, a supplement to the act of 1837, chap. 217. *Ib.*
49. The act of 1786, chap. 45, abolished the right of primogeniture, and made all estates tail general thereafter acquired, to descend as fee-simple estates, and by the act of 1782, chap. 23, an estate in fee-tail may be conveyed in the same manner as an act in fee-simple: *Chelton vs. Henderson's Lessee*, 432.
50. A debtor applied, on the 2nd of July, 1850, to a justice of the orphans court of *Howard* district, for the benefit of the insolvent laws. He had resided in *Howard* district for twelve months immediately preceding his application, but for the residue of the two years had resided in *Baltimore* city. He presented with his petition a certificate of the clerk of *Howard* district, that he had not, within two years, applied for the benefit of the insolvent laws of the State, but did not present a similar certificate from the clerk of *Baltimore* county. He received his personal discharge, and failing to give notice to his creditors, as required by the order of the justice, on the 20th of December, 1850, *Howard* district court, before whom said order required him to appear, ordered the time of publication to be extended. HELD: That the defects, if any, in these proceedings, are cured by the 2nd sections of the act of 1844, ch. 304, and of the act of 1836, chap. 393. *Baylies & Tyson, vs. Ellicott*, 452.
51. The act of 1849, chap. 88, granting appeals to this court, in cases of insolvent proceedings, applies to *Howard* district court, as well as to the county courts. This act is a remedial law, and is to be liberally construed. *Ib.*
52. The law creating *Howard* district court, invested it with all the powers and jurisdiction of the county courts, and in all acts of Assembly passed since, touching the powers and jurisdiction of county courts, this court is to be regarded as included, unless excluded in terms. *Ib.*
53. The true construction of the 2nd section of the act of 1810, chap. 34, relating to nuncupative wills, requires, that the testamentary words, or the substance thereof, should be reduced to writing, within six

CONSTRUCTION OF ACTS AND STATUTES.—*Continued.*

days after they were uttered and shown to and approved of, as correct, by each of the attesting witnesses. *Welling vs. Owings*, 467.

54. The word "testimony," used in this section, applies to the nuncupation itself, and not to the prerequisites required by the 1st section, which may be established at any time before the paper is admitted to probate. *Ib.*
55. The testamentary words must be reduced to writing, and seen by, and found to be correct, by *each* of the attesting witnesses, within the period limited by the 2nd section of this act. *Ib.*

See CONSTITUTIONAL LAW.

CONTRACTS, CONSTRUCTION OF, &c.

1. Where a contract is made in another State, questions arising upon it in this State, must, in the absence of legal proof of what the law of such other State is, be decided by the law of *Maryland*. *Dakin vs. Pomeroy and Crafts*, 1.
2. The *lex loci* determines the nature, construction and validity of foreign contracts, but the *lex fori* is to be resorted to in order to ascertain the remedy which is to be used. *Ib.*
3. The plaintiff made a contract with defendants for grading a section of rail road, to be completed by the 1st of October, 1845. By this contract monthly estimates were to be made by the defendant's agent, of the quantity and value of the work done during the month, *four-fifths* of which value was to be paid to the plaintiff immediately, and the balance on completion of the work, said estimates to be conclusive between the parties. If the plaintiff failed to comply with all its terms, or if it should appear to their agent that the work does not progress with sufficient speed, the defendants may annul the contract, upon giving to the plaintiff *three days' notice* in writing to that effect, in which case the plaintiff was to forfeit the unpaid value of the work done. This right to annul was not to be *mutual*, but to be exercised by defendants only. Estimates and payments abating the one-fifth were made up to the 29th of October, 1845, and the work was prosecuted by plaintiff until the 6th of November following, when defendants, *without notice*, entered upon and expelled the plaintiff from the work. **Held:** that by this act the defendants annulled the contract, and thereby released the plaintiff, and he may sue in general *assumpsit* for the value of the work actually done, and is not bound to resort to his special action on the contract. *Rodemer vs. Hazlehurst & Co.*, 288.
4. The stipulation in this contract, that the right to annul it is not mutual, means, that the defendants may, in any state of things, hold the plaintiff to his contract, while for causes alleged they are free to break it; but it further means, that if they exercise this privilege it is *then broken*, because once repudiated by the defendant it cannot bind the plaintiff. *Ib.*
5. Putting an end to a contract by one party is an abandonment of it by him, and if his acts in so doing are such as necessarily to prevent a

CONTRACTS, CONSTRUCTION OF, &c.—Continued.

- performance on the part of the other, the whole contract is rescinded, and the other party may resort to his *quantum meruit*. *Ib.*
6. Where a contract contains a number of distinct stipulations, which admit of being separately executed and closed, each is taken distributively, and considered as forming the matter of a separate agreement after it is so closed. *Ib.*
 7. In this case the plaintiff is concluded by the monthly settlements, and by reason of their being closed as distinct and separate portions of the contract, he cannot open them again to prove and recover the actual value of the work. *Ib.*
 8. These partial payments bind him to the whole settlement, and so far as the work has been adjusted under the contract he can recover only the balance due upon the basis of these settlements, including the one-fifth reserved for ulterior settlement. *Ib.*
 9. The defendants by their own acts depriving the plaintiff of the means and opportunity to comply with the contract, have released all claim to the forfeiture mentioned in the agreement. *Ib.*
 10. So far as work has been performed which remains unadjusted between the parties by the monthly estimates, the plaintiff is not bound by the contract, but is at large upon his *quantum meruit* and may prove the actual value of the work. *Ib.*

See SALES.

COURT OF CHANCERY, 13 to 17.

SPECIFIC EXECUTION OF CONTRACTS.

CONVERSION.

1. Conversion is the wrongful asportation of a chattel with the intent to appropriate it to the taker's use, and when such asportation and intent are proved, the conversion is established, no matter under what impression the taker may have acted. *Harker vs. Dement*, 8.

See TROVER, 10.

LIMITATIONS OF ACTIONS, 4.

CONVEYANCES.

See DEEDS, CONSTRUCTION OF. &c.

FRAUDULENT CONVEYANCES.

INSOLVENT DEDTOR.

COPARCENERS.

1. In this State, co-heirs are assimilated to coparceners, constituting together one heir. *Morris vs. Harris*, 19.
2. At common law, every partition between coparceners, has an implied warranty annexed, that if either party loses any of his share by eviction, on account of defect of title in the ancestor, he may enter upon the others and defeat the partition as for condition broken. *Ib.*

CORPORATIONS,

1. The act of 1839, ch. 217, and its supplements, incorporating the

CORPORATIONS.—*Continued.*

“*Frederick Female Seminary*,” do not constitute the “board of commissioners” therein named, a corporate body. *Board of Commissioners for The Frederick Female Seminary vs. The State*, 379.

2. By this act of 1839, the board of trustees, which was to come into existence by the 5th and 6th sections of that act, is the body corporate, thereby created, under the name and style of “The Trustees of the *Frederick Female Seminary*.” *Ib.*
3. It was not necessary that all the duties of the board of commissioners, should be performed, before the board of trustees could organise and open the school. *Ib.*
4. The duties to be performed by the board of commissioners, did not require a corporate existence, and for any omission of their duty, or wrongful and injurious acts, their bond given, as required by the 2nd section of the act of 1839, was answerable, and not the charter of the board of trustees. *Ib.*
5. The duration of the existence of the board of commissioners, in the absence of a period fixed by the act of Assembly, is determined by the duties, for the performance of which it was created. *Ib.*
6. These two boards, of commissioners, and trustees, may exist at the same time, and a member of one, may at the same time be a member of the other. *Ib.*
7. Every allegation or matter affirmed in the preamble to an act or resolution of the legislature, is not to be considered as incontrovertible. *Ib.*
8. The board of commissioners were authorised to become a board of trustees, after the grounds were purchased, and the necessary buildings and improvements were erected thereon, and their doing this, and opening and organising a school, before the whole proceeds of the lottery grants had been received, and all the duties of the board of commissioners, had been performed, was no violation of their charter. *Ib.*
9. It was their duty under the charter, to open the school as soon as they possibly could, after the grounds were purchased and paid for, and the buildings ready to receive students. *Ib.*
10. The act of 1845, ch. 75, authorising the attorney general to institute proceedings against the board of commissioners for the *Frederick Female Seminary*, to inquire whether the charter and franchises of said board, ought not to be annulled by reason of abuser thereof, only authorised charges of abuse of franchise, and did not authorise any inquiry touching the breaches alleged in the *scire facias* in this case. *Ib.*
11. The act did not authorise any proceedings against the four additional commissioners, appointed by the act of 1844, ch. 27, a supplement to the act of 1837, ch. 217. *Ib.*

COUNSEL FEES.

See ORPHANS COURT, 9, 19.

COURT OF CHANCERY.

1. It is well settled, that where there are two mortgagees under separate and distinct mortgages from the same mortgagor, and the prior mortgagee has a lien on two distinct funds, and the second on one of them only, equity will, for the protection of the subsequent incumbrancer, compel the prior incumbrancer to resort to that fund on which the second has no lien. *Woollen's Excr's vs. Hillen*, 185.
2. But this rule does not apply to a case where the prior mortgagee has a lien on two distinct estates of two separate and distinct mortgagors, and the subsequent mortgagee holds a lien on one only of these estates, encumbered by the prior mortgage. *Ib.*
3. A testator directed his executors to sell certain real estate, and as soon as the proceeds were collected, to divide the same into eight equal parts, and "to hold one share in their hands for the separate use and maintenance of the testator's daughter and her children, or to invest the same in lands to be settled in trust on his said daughter and her heirs forever, for the sole use and maintenance and support of her and her children, without the control of her husband, as to his executors should seem most expedient." The acting executor sold a part of the land and retained the proceeds in his hands, not being able, as he alleged, to invest it in lands. HELD: That the testator designed that the principal of the sum devised to his daughter, should not be diminished; that the interest alone should be applied to her maintenance and that of her children, and that the executor was bound to pay interest on the sum so retained by him. *Worthington's Exc'r, vs. Owings*, 195.
4. With respect to this fund, the executor was invested with the powers and responsibilities of a trustee, and if he was unable to invest it in land, and did not choose to retain it upon condition of paying interest, it was his duty to apply to a court of equity, for an order directing a temporary investment of it, so as to make it productive. *Ib.*
5. Where a trustee, in two characters, has the means of committing fraud, as trustee and purchaser both, a court of equity will interpose, and not compel the party to wait until the mischief is done. *Powles, et al., vs. Dilley, et al.*, 222.
6. If property in the hands of an insolvent's trustee is not secure, and is about to be wasted and applied by the trustee to his own use, a court of equity may interfere to prevent the abuse of the trust, until the proper remedy can be applied, provided the mischief be irreparable, or the consequences of such a character as to be without relief, except in equity. *Ib.*
7. But where there is adequate remedy pointed out by law, equity will not interfere; more especially where the party sought to be affected by the proceeding, derives his power under a special jurisdiction, and is made responsible to that jurisdiction for the exercises of his trust. *Ib.*
8. The court of chancery has no jurisdiction over the appointment

COURT OF CHANCERY.— *Continued.*

and removal of trustees of insolvent debtors, the whole subject being regulated by statutes, and resting with the courts of law. *Ib.*

9. The act of 1836 assumes for the court the duty to see, that no substantial rights of the infant are injuriously affected by the proceedings under the commission, and in the cause. *Higgins, et al., vs. Howitz*, 341.
10. Whether notice of the execution of a commission be served on the guardian to the infant or his solicitor, it is in view of the act of 1836, surplusage, and can vitiate nothing that is presumed to have been done under it. *Ib.*
11. The practice that occasionally occurs, of making the complainant the trustee for the sale of the property under the decree, is objectionable. *Ib.*
12. The court of chancery has no power during the life of the tenant for life, to order the proceeds of sale of the negro to be invested for the benefit of the legatee in remainder. While the tenant for life is living, she is the person to claim the negro. *Steven's, Exc'rs vs. Gordy*, 405.
13. A vendee agreed to purchase certain lands, for a certain sum, part of which he was to pay on the 1st of January, 1848, and execute a mortgage of the lands to secure the balance, both of which he failed to do, and at the time the first payment became due, it was proved that he was in embarrassed circumstances, and was pressed by other creditors whose claims he was unable to satisfy. HELD: That under these circumstances the vendor was not bound to resort to his remedy at law, before he could enforce his lien in equity. *Stull vs. Hurtt*, 446.
14. A vendee contracted in writing to purchase "a farm or tract of land, called *Mother's Care*, containing one hundred and seventy-three acres, *more or less*," for which he promised to pay the gross sum of \$2,300. At the time the contract was made, the vendor, when questioned as to the number of acres, told the vendee, that, "he had heard his brother say, that the old plat called for one hundred and seventy-three acres, but he did not himself know the quantity, never having seen it surveyed. HELD: That this statement of the vendor, cannot be considered such a representation as would make it inequitable to compel the vendee to perform the contract, though the farm was found to contain but one hundred and forty-five acres. *Ib.*
15. If this statement could be regarded as a representation of quantity, on the part of the vendor, the proposition, that it was of the essence and part of the contract, and being so, this large discrepancy ought to entitle the vendee to an allowance for the deficiency, might have some weight. *Ib.*
16. In the absence of fraud, wilful concealment, misrepresentation or any specific representation of quantity, except as stated in the above contract, from which it clearly appears the land was not sold by the acre, equity cannot be invoked to allow for a deficiency. *Ib.*

COURT OF CHANCERY.—*Continued.*

17. In the absence of a fraud, the words, "*more or less*," must be considered as qualifying the representation of quantity, and neither party can claim relief either for a deficiency or a surplus. *Ib.*

See PRACTICE IN CHANCERY.

COVENANT.

1. A covenant for the quiet enjoyment of lands, cannot be assigned under the act of 1829, ch. 51, so as to authorise the assignee to sue for a breach of it. That act authorises the assignments of judgments, bonds, specialties, or other *choses in action* for the *payment of money*, and not stipulations to do or not to do some act or duty, *Dakin and Pomeroy vs. Crafts*, 1.
- 2 The assignment of such a covenant made in respect to lands in *New York* cannot be used as a set off in *Maryland*. *Ib.*
3. Such a covenant cannot well be separated from the deed of which it is a part, and an assignment of it to a person who had no interest in the land, will not entitle the assignee to institute suit upon it in his own name, or to use such assignment as a set off. *Ib.*
4. At common law, every partition between coparceners, has an implied warranty annexed, that if either party loses any of his share by eviction, on account of defect of title in the ancestor, he may enter upon the others, and defeat the partition as for condition broken. *Morris vs. Harris*, 19.
5. But all covenants arising from implication of law, are necessarily controlled or annulled by express covenants between the parties. *Ib.*
6. When a party covenants for quiet enjoyment and possession against himself and those claiming under him, he excludes the idea of a covenant against all the world. *Ib.*

See PRACTICE, 34.

EVIDENCE, 31, 32.

PLEAS AND PLEADING, 6.

DAMAGES, MEASURE OF, &c.

1. In an action of trespass or trover by a termor against his reversioner, for an unauthorised interruption of his possession during the term, the measure of damages is the actual loss sustained by the lessee. *Harker vs. Dement*, 8.
2. But in such an action against a stranger and wrong doer, the termor is treated as the absolute owner of the property, and he is entitled to recover its full value. *Ib.*
3. The termor being bound to restore the property to the person from whom he obtained it, or to stand responsible in damages for its full value, has the right to recover its full value from a stranger, who has wrongfully deprived him of it. *Ib.*
4. Upon the ground of ulterior responsibility, the borrower of a chattel may maintain an action of trespass or trover against a wrong doer, who has violated his possession, and recover the full value of the property of which he was dispossessed. *Ib.*

DAMAGES, MEASURE OF, &c.—Continued.

5. A pawnee of goods may maintain trespass against a stranger, who takes them away and recover their whole value in damages, though they were plodged to him for less, because he is answerable for the excess to the owner. *Ib.*
6. A party agreed to convey certain lands, in part payment for the purchase money of other lands; in an action for the breach of this agreement. **Held:** That the time at which the breach occurred, was the period at which the value of the lands should be estimated, in assessing damages. *Marshall vs. Haney*, 251.

See EJECTMENT.

PRACTICE, 49, 50.

TROVER, 10.

DECLARATIONS AND ADMISSIONS.

1. An attesting witness to a will declared, on the same day that the will was executed, that he did not believe the testator to be, at the time he executed the will, a sane person, and that he signed the will as a witness, merely to gratify the testator. **Held:** that these declarations, (the witness being dead,) are properly admissible in evidence. *Townshend vs. Townshend*, 506.
2. The attestation of a witness to a will, imports all that is requisite to make the will good and valid, so far as his signature can go, and his declarations, (the witness being dead,) are admissible to impeach these presumptions of law. *Ib.*

See EVIDENCE, l. 19, 20.

DEEDS, CONSTRUCTION OF, &c.

1. A party conveyed lands to a grantee, without adding the words "and his heirs." The object of the deed was, that the grantee might sell the lands, and discharge, out of the proceeds of the sale, the grantor's debts. **Held:** That this deed passed a fee to the trustee, of which the latter had power to dispose and to pass to the purchaser. *Spessard vs. Rohrer*, 261.
2. An assignment or conveyance of an interest in trust will carry a fee without words of limitation, when the intent is manifest. *Ib.*
3. Under this deed the creditors of the grantor could have compelled a sale of this property, or of so much as was necessary to pay their debts. *Ib.*
4. The deed of a plaintiff in ejectment, conveying the lands in dispute, made after commencement of the suit, is not void, because the defendant, at the date of its execution, held adverse possession of the land. *Cresap's Lessee, vs. Hutson*, 269.
5. A *bona fide* conveyance of the land in dispute, for a valuable consideration, made after commencement of the suit by the plaintiff, in an action of ejectment, is not void for maintenance, or champerty. *Ib.*
6. A grantor conveyed by deed of gift to his two sons, "one-half of all my personal estate of which I may die possessed." **Held:** That

EEDDS, CONSTRUCTION OF, &c.—Continued.

this deed was competent to pass to the grantee one-half of the personal estate which could be shown by parol proof to remain in his possession at the time of his death, after payment of his debts and other proper expenses and charges of administration. *Hannon's Exc'rs, vs. State use of Robey*, 440.

7. A deed conveying to a grantee all the personal property of the grantor, without describing particular articles, will pass all that may be proved by parol testimony to have belonged to the grantor at the date of the deed—a description of particulars is not necessary. *Ib.*

8. Every sane man has authority to give away his property by deed, unless he attempts to give it upon terms which the law repudiates as against sound policy. *Ib.*

See **INSOLVENT DEBTOR.**

FRAUDULENT CONVEYANCES.

CONTRACTS, &c.

DEFICIENCY IN LAND SOLD.

See **COURT OF CHANCERY**, 13 to 17.

DELIVERY.

See **SALES**, 7.

DEMAND AND NOTICE.

See **BILLS OF EXCHANGE, &c.**, 10 to 20.

DEMAND AND REFUSAL.

See **TROVER**, 12.

DEMURRER.

See **PRACTICE IN COURT OF APPEALS**, 13.

PRACTICE, 51.

PLEAS AND PLEADING, 8, 12.

DESCRIPTION OF LAND.

1. An agreement under seal for the conveyance of land, described it as "a farm on which is a grist mill, saw mill and milling apparatus, containing 230 acres." **HELD**: 'That this description is uncertain, and the uncertainty cannot be removed by parol testimony. *Taney vs. Bachtell*, 205.

DEVISE, DEVISEE.

See **WILL AND TESTAMENT**, 6, 8 to 17.

ORPHANS COURT, 27.

DISCOVERY, BILL OF

See **PRACTICE IN CHANCERY**, 34.

DISTRIBUTION, DISTRIBUTE,

See **PRACTICE IN CHANCERY**, 29 to 33.

DOWER.

1. Dower may be assigned by parol. *Morris vs. Harris*, 19.

2. By the act of 1798, chap. 101, sub-chap. 13, a widow may become entitled to a dower after having accepted a devise in the will, in lieu of dower, provided nothing passes by such devise, but in such cases

DOWER.—Continued.

- there must be clear proof that the provision for her in the will is of no value. *Chew Exc'r of Gibson, vs. The Farmers Bank et al.*, 361.
3. Where a testator devises land which he had previously mortgaged, and charges it in the hands of the devisee, with a provision for his wife in lieu of her dower, which provision the widow accepts, and the land is sold to pay the mortgage debt, she may have a preferred claim upon the surplus proceeds of sale, as against the devisee, but she has no claim against the mortgagee. *Ib.*
 4. A widow has no claim under her husband's will to lands which he had previously mortgaged, and which it becomes necessary to sell to pay the mortgage debt; she is entitled to dower in the mortgaged land, but if she elects to abide by the will, she has no longer any claim to the land. *Ib.*
 5. No offer by the husband, though accepted by the wife, will deprive a mortgagee of his security; they cannot make mortgaged premises answerable for the widow's claim for dower in other lands. *Ib.*
 6. A widow may recover dower before foreclosure of a mortgage, but after the sale of the mortgaged premises, she has no claim. *Ib.*
 7. An annuity given by will to a widow in lieu of dower, became payable in 1818. No part of this was paid, and no legal steps taken to enforce its payment until 1846, when the widow filed a bill claiming the whole amount of the annuity, with interest, as a charge upon the lands, (now in the hands of *bona fide* purchasers,) devised to the parties, who were, by the will, required to pay it. **HELD:** That laches and lapse of time was an effectual bar to the claim. *Ib.*
 8. The fact that she did not know that this annuity was a charge upon the lands until 1839, when she was informed of it by a decision of the Court of Appeals, will not excuse her delay and neglect to proceed against the parties personally responsible for the payment of the annuity. *Ib.*
 9. A lapse of twenty-five years from the inception of title, a delay entirely unexplained, and without any claim whatever in the intermediate time being made, is an effectual bar to a claim for rents and profits. *Ib.*
 10. The case of *Sellman vs. Bowen*, 8 G. & J., overrules the case of *Steiger's Adm'r, vs. Hillen*, 5 G. & J., 121, only in so far as the latter case countenances the doctrine, that a widow may, *at law*, recover from the alienee of her husband, damages for the detention of her dower. *Chew exc'r of Gibson, vs. The Farmers Bank, et al.*, 361.
 11. Nothing else in the case of *Steiger's Adm'r, vs. Hillen*, is questioned; and that case, so far as the law relating to laches and lapse of time is concerned, is affirmed by the case of *Kiddall vs. Trimble, Exc'r of Jacob*, 8 Gill, 507, and by this case; such ought now to be considered settled law in *Maryland*. *Ib.*

EJECTMENT.

1. The docket entries in an ejectment suit, showed that the defendant, the tenant in possession, appeared at the imparlance term, and took

EJECTMENT.—Continued.

defence on warrant under the plea of not guilty, on which issue was joined; and immediately thereupon, without any new declaration against the defendant, followed a judgment, "That plaintiff recover against the defendant his term, and the sum of \$500, his damages claimed in his declaration." Two terms afterwards the plaintiff applied to the court to amend these entries, by striking out the words, "plea not guilty, and defence on warrant," upon the ground that they were interlined by the clerk after the rendition of the judgment. The court ordered the words to be stricken out, and the judgment to stand as rendered for want of a plea; thus making it a judgment upon *nil dicit*. **Held:** That this judgment was erroneous in form and substance, both as it originally stood on the docket, and as corrected by the court. *Cushwa vs. Cushwa*, 242.

2. Admitting the absence of a plea, all the court could do, was to adjudge the title to the plaintiff: the damages must be ascertained by the verdict of a jury. *Ib.*
3. In an action of ejectment where damages are laid in the declaration, the plaintiff, before he can have a judgment upon *nil dicit* establishing his title, must release his damages. *Ib.*
4. The judgment upon *nil dicit*, can only be against the casual ejector, and this judgment being against the tenant in possession, is for this reason erroneous. *Ib.*
5. After entering into the consent rule in ejectment, the plaintiff, before he can enter a default, must serve a new or altered declaration. *Ib.*
6. Admitting the plea and issue to be in, the judgment cannot stand, because it had no verdict to sustain it. *Ib.*
7. A plaintiff in an ejectment suit, after the commencement of the action, but before trial, conveyed by deed, his interest in the lands in controversy, to a third party, **Held:** That this deed was a bar to his recovery. *Cresap's Lessee, vs. Hutson*, 269.
8. To recover in an ejectment, the lessor of the plaintiff must have the legal estate in the land, both at the commencement and trial of the cause. *Ib.*
9. A *bona fide* conveyance of the land in dispute, for a valuable consideration, made after commencement of the suit by the plaintiff, in an action of ejectment, is not void for maintenance, or champerty. *Ib.*
10. A defence on warrant, is not necessarily a defence by adverse possession. *Ib.*
11. A defendant at first, took defence on warrant for the whole land in dispute, which he afterwards abandoned as to part. **Held:** That the plaintiff could not make use of the first defence, in order to show adverse possession of the whole in the defendant. *Ib.*
12. Where a defendant claims but part of the lands in controversy, his proper defence is upon warrant; the lands claimed by him must be located, so as to ascertain for what land the plaintiff is to get

EJECTMENT.—Continued.

judgment against the casual ejector, and what is to be settled by the jury. *Clement's Lessee vs. Ruckle*, 326.

13. A judgment against the casual ejector must always be entered before the jury are sworn, unless the defendant takes defence for all the lands claimed by the plaintiff. *Ib.*

EMBLEMENTS.

See ORPHANS COURT, 27.

ESCHEAT GRANT.

See LAND OFFICE, 1.

ESTATES TAIL.

See RULE IN SHELLEY'S CASE.

ESTOPPEL.

1. A conveyance made by a *feme covert* under a privy examination as provided by the act of 1776, ch. 14, operates as an estoppel against her as effectually as if she were *sui juris*. *Morris vs. Harris*, 19.
2. When a *feme covert* parts with her property by any form or mode of conveyance executed under the provisions of said act, she is by her own voluntary act precluded from disavowing it, and is bound by the express covenants, conditions and terms of her own deed. *Ib.*

EVIDENCE.

1. The declarations of a person exercising authority that he possesses it, can never be received as evidence of the fact of his authority *Harker vs. Dement*, 8.
2. Parol proof of what occurred at the trial of a cause between certain parties, is not admissible, unless preceded by the production of the record of the case to which such testimony referred. *Ib.*
3. The motive by which a defendant was influenced in converting to his own use the property of another, is only admissible when introduced to repel an attempt by the plaintiff to recover from him, in an action of trover, exemplary damages. *Ib.*
4. Two co-heirs executed a deed of partition in which they mutually covenanted that each should hold his part of the land free and discharged from all title, interest, claim and demand of the other. **Held:** that one of these co-heirs was a competent witness for the other in an action brought by the latter against a third party, involving the title to a part of the estate conveyed to the plaintiff by the deed of partition. *Morris vs. Harris*, 19.
5. A widow who has received her dower with the consent of the heirs at law, is a competent witness for the latter to prove the seizin of her husband in lauds allotted to them. *Ib.*
6. It is admissible to show by parol, that a receipt executed by the appellant to his mother, stating that he had received from her, as his guardian, the sum of \$571.64, being his distributive share of his father's personal estate, was intended to operate as a payment of so much money upon lands, for the purchase of which he had made a parol agreement with his mother. *Shepherd vs. Bevin, et al.*, 32.

EVIDENCE,—*Continued.*

7. Any paper that purports to be a receipt or acknowledgment for the payment of money, may be explained or contradicted. *Ib.*
8. The act of 1826, ch. 247, does not dispense with the necessity of a full record, as evidence of a judgment in any case, in which, before that act, a full record was necessary. *Mitchell's Adm'r. vs. Williamson's Exc'rs*, 71.
9. A testatrix executed her will in 1804, and appointed an executor, but desired that no letters of administration be taken out on her estate. **HELD:** that the isolated fact that the person named as executor sold the rest of the negroes, except the petitioner, belonging to her estate, is not evidence legally sufficient to warrant the jury in finding that such executor acted under letters testamentary, legally granted. *Anderson vs. Garrett*, 120.
10. Where the contents of a will improperly destroyed, are satisfactorily proved by witnesses, they will be established as the will, but the policy of the law, which throws around wills more protections than to any other mode of conveyance, requires such contents to be proved by the clearest, the most conclusive and satisfactory proof. *Rhodes, et al., vs. Vinson, et al.*, 169.
11. The proof of the *entire* contents must be conclusive and satisfactory. *Ib.*
12. Mere proximity in point of time, between the date of the assignment and the application for the benefit of the insolvent laws, standing alone, without any supporting circumstances, is not to be received as adequate or reliable proof of what the insolvent intended or anticipated at the time of executing the assignment. *Malcolm vs. Hall*, 177.
13. There are many decisions both at law and in equity, which decide that receipts in deeds are only *prima facie* evidence of payment, and that parol evidence is admissible to contradict such receipts, but where fraud is out of the question, there is no decision which goes so far as to decide that parol evidence is admissible, to vary, contradict and render utterly void a solemn deed. *Woollen's Excr's, vs. Hillen*, 185.
14. A release, of a mortgage recited that the mortgagor had fully paid and satisfied the debt to the mortgagees. On the same day the mortgagor executed a new mortgage to one of the same mortgagees. **HELD:** That this release could not be explained by parol proof. *Ib.*
15. To an action of covenant upon certain articles of agreement, the defendant pleaded performance on his part, upon which plea was the only issue in the case. The plaintiff, besides the written agreement, offered parol testimony, to remove the uncertainty of the description of the land in the agreement, which the county court admitted. The jury gave a verdict for the plaintiff, and assessed damages. **HELD:** That this testimony was inadmissible for any purpose under the issue in this case, and as this court cannot say

EVIDENCE — Continued.

that it had no influence on the jury in assessing the damages its admission is a good cause for the reversal of the judgment. *Taney vs. Bachtell*, 205.

16. Where evidence is offered without its being stated for what purpose it is offered, it is error to reject it if it was admissible for any purpose. *Ib.*
17. This being a contract relating to land, every part of it must be in writing, and verbal testimony cannot be admitted to supply any defect or omission in it. *Ib.*
18. It is no objection to the competency of a witness, that he is the solicitor for the party for whom he testifies, such objections go to the credibility and not to the competency of the witness. *Beatty vs. Davis*, 211.
19. The admissions of a party on the record are evidence, although he stands in the attitude only of a trustee, provided the admissions were made after the fiduciary character has attached. *Ib.*
20. In this case the declarations and admissions of an insolvent trustee, a party on the record, made after he became such trustee, were held admissible in evidence. *Ib.*
21. Where an assignment is assailed as a fraud upon the insolvent laws, the declarations of the parties to it, made at the time, showing that it was only executed after urgent persuasions on the part of the creditor, are admissible as part of the *res gesta*, to explain the motive and circumstances surrounding the assignment. *Powles, et al., vs. Dilley, et al.*, 222.
22. The rule, with but an occasional exception, is well established and of long standing, that the answer of one co-defendant is not to be received *against* another, because if the complainant wishes to establish a fact by the evidence of one defendant, he may examine him as a witness, which will afford the co-defendant an opportunity of a cross-examination. *Ib.*
23. But where the complainant calls upon defendant to answer, he makes the latter a witness, and so far as the answer is responsive to the bill, it must be received against the complainant, and it cannot be excluded because there is a co-defendant in whose *favor* it may and does consequentially operate. *Ib.*
24. A party who cites a witness and examines him, is not at liberty to reject his testimony afterwards. *Ib.*
25. The authority of a court of competent jurisdiction, when coming incidentally in question, is conclusive of the matter decided, and cannot be impeached on the ground of *informality* in the proceedings, or mistake or error in the matter on which they have adjudicated. *Ib.*
26. Where the question of the appointment of an insolvent trustee arises incidentally in other courts, it is not competent there to inquire, whether he was rightfully appointed or not. *Ib.*

EVIDENCE—Continued.

27. Evidence of what a witness said under oath in a former trial, is admissible in a subsequent suit between the same parties, when the witness is dead, or out of the jurisdiction of the court, or cannot be found after diligent search, or is insane, or sick, or unable to testify, or is kept away by the adverse party after summons. *Marshall vs. Haney*, 251.
28. Where an objection is taken to the admissibility of evidence generally, this court is not prevented by the act of 1825, ch. 117, from examining the pleadings, because the admissibility of the evidence is entirely dependent upon them. *Ib.*
29. Evidence of the contents of receipts, given at the land office, to parties who take up lands, is not admissible, though the witness proved that it was the custom of said office to require such receipts to be delivered up when patents are issued. *Ib.*
30. The non-production of written instruments, must be accounted for, before evidence of their contents can be given. *Ib.*
31. The acceptance of a deed by the covenantee, in discharge of a covenant to convey, will, in the absence of mistake, misrepresentation, or fraud, discharge the covenantor, though the land conveyed be not the identical land mentioned in the covenant. *Ib.*
32. The conveyance by the covenantee, of the same land to a third party is, in the absence of evidence of mistake, misrepresentation, or fraud, evidence of his acceptance of the deed conveying this land to him from the covenantor, under the covenant. *Ib.*
33. If any party pleads *payment*, and afterwards substitutes for that plea *non est factum*, the former plea cannot be relied on, to prove the instrument his deed. *Cresap's Lessee, vs. Hulson*, 269.
34. It is no objection to the competency of a witness, that he is the acting attorney for the party, in whose favor he offers to testify. Such objections go to the credibility, and not the competency of a witness. *Ib.*
35. In an action on a collector's bond, the defendant failed to plead, and judgment by default was entered against him. On the same day of the entry of this judgment upon *nil dicit*, the following entry was made on the docket: "judgment for \$30,000 debt, and \$60,000 damages and costs; damages to be released on payment of \$428.28, with interest from 1st of March, 1840, and costs \$9.82." **HELD:** That parol evidence is admissible to prove that this judgment was agreed to be final by confession; that in recording the last judgment it was intended to supersede the judgment by default, and that its remaining on the docket was a clerical error. *Clammer vs. State use of Beall*, 279.
36. A witness stated that a letter written to himself, the contents of which he offered to prove, was 'either lost or delivered to one of the counsel in the cause and that he had made diligent search for it but could not find it,' **HELD:** That this was not sufficient proof of

EVIDENCE—*Continued.*

- the loss of the letter, to let in parol proof of its contents. *Clement's, Lessee vs. Ruckle*, 326.
37. An escheat grant is *prima facie* evidence of title. *Ib.*
38. The legal sufficiency of evidence in a question of law of which the court are the exclusive judges. *Clarke's Adm'r, vs. Marriott's Adm'r*, 331.
39. Wherever testimony is so light and inconclusive that no rational well constructed mind can infer from it the fact which it is offered to establish, it is the duty of the court when applied to for that purpose, to instruct the jury that there is no evidence before them to warrant their finding the fact thus attempted to be proved. *Ib.*
40. Proof was offered that a certain *R. P.*, claiming to act as trustee, employed witness to sell all the estate of *Walter Clarke*, and that at the sale he sold the negro woman *Jemima*, to *Caleb*, the brother of said *Walter*, and that *Walter* there delivered the woman to *Caleb*. The witness does not know what was bid for the woman, or whether the money so bid was ever paid; that the woman was never out of possession of *Walter*, except as stated, but continued in his possession to his death, and afterwards with his widow. HELD: That this testimony was not sufficient to justify the inference that there was a sale of the negro woman in question from *Walter* to *Caleb Clarke*, and that it was error to permit it to go to the jury for that purpose. *Ib.*
41. This evidence might have led to the conclusion, that *Walter*, standing by and remaining silent while the auctioneer, by the direction of *R. P.*, was selling the negro, thus forfeited his title to his brother, provided the latter had, at the time, taken possession, or had ever afterwards claimed the property. *Ib.*
42. Distribution accounts, filed with answers of the executors, showing a sufficiency of assets, but not introduced into the case as testimony, are not evidence in the cause. *Steren's Exc'rs, vs. Gordy*, 405.
43. An appeal was taken from *Charles* county court, on the 27th of March, 1846, and the record was not filed in this court until the 25th of May, 1848. The appellee moved to dismiss the appeal, because the record was not transmitted within the nine months, and read a certificate of the clerk of the county, under the seal of the county court, stating that the record was detained in said office by a verbal order of the appellant's counsel. HELD: That this certificate is not legitimately before this court for any purpose; it has none of the attributes of legal evidence, and the appeal is protected by the act of 1842, chap. 288. *Hannon's Exc'rs, vs. State, use of Robey*, 440.
44. A testator gave to his daughter by will, one-third of the personal property he might die possessed of, not otherwise willed or disposed of. To an action by the legatee against the executors to recover this legacy, the defendants pleaded that they had paid to the plaintiff the full amount of her proportion of the estate of her father, and on this plea issue was joined. HELD: That under this plea it was com-

EVIDENCE.—Continued.

petent for the executors to give in evidence a deed, executed by the testator in his lifetime, conveying to his sons one-half of the personal estate of which he might die possessed, in order to reduce the aggregate amount of the estate, out of which plaintiff was to receive her proportion. *Ib.*

45 The finding of a jury upon the trial of issues framed upon a *caveat* to a will, is conclusive, with respect to all questions touching the validity of the will. *Glass et al., vs. Ramsey and Jenkins*, 456.

46. But when such a verdict is introduced to defeat a claim by the executors, for costs and expenses incurred in resisting the *caveat*, upon the ground that it imputed fraud to the executors in the procurement of the will, it is collaterally introduced, and is open to examination. *Ib.*

47. An attesting witness to a will declared, on the same day that the will was executed, that he did not believe the testator to be, at the time he executed the will, a sane person, and that he signed the will as a witness, merely to gratify the testator. **Held:** that these declarations, (the witness being dead,) are properly admissible in evidence. *Townshend vs. Townshend*, 506.

48. The attestation of a witness to a will, imports all that is requisite to make the will good and valid, so far as his signature can go, and his declarations, (the witness being dead,) are admissible to impeach these presumptions of law. *Ib.*

See JUDGMENTS OF COURTS OF SISTER STATES.

BILLS OF EXCHANGE, &c., 6, 7.

PRACTICE, 51, 52.

MISTAKE, 1, 2.

BANKRUPTS.

PRACTICE IN CHANCERY.

EXECUTION.

See PRACTICE, 48.

EXECUTORS AND ADMINISTRATORS.

See ORPHANS COURT, 10, 11.

WILL AND TESTAMENT, 18.

EXECUTORY DEVISE.

See WILL AND TESTAMENT, 8 to 17.

EX POST FACTO LAWS.

See CONSTITUTIONAL LAW, 3, 6, 7.

FAILURE OF ISSUE.

See WILL AND TESTAMENT, 8 to 17.

FALSE IMPRISONMENT.

See PLEAS AND PLEADING, 7.

FEME COVERT.

1. A conveyance made by a *feme covert* under a privy examination as provided by the act of 1776, chap. 14, operates as an estoppel against her as effectually as if she were *sui juris*. *Morris vs. Harris*, 19.

FEME COVERT.—Continued.

2. When a *feme covert* parts with her property by any form or mode of conveyance executed under the provisions of said act, she is by her own voluntary act precluded from disavowing it, and is bound by the express covenants, conditions and terms of her own deed. *Ib.*

See HUSBAND AND WIFE.

FORBEARANCE,

See PRACTICE, 61.

FOREIGN CONTRACTS.

See CONTRACTS, &c., 1, 2.

FORFEITURE.

See SALES, 4.

NOTICE, 2.

ASSUMPSIT, 10.

CORPORATIONS.

FRANCHISES, FORFEITURE OF.

See CORPORATIONS.

FRAUD.

1. The right of a party who had purchased a slave, warranted by the vendor to be sound, but who proved to be unsound, to rescind the contract does not depend upon the fact that he returned or offered to return the negro within a reasonable time after the sale, but whether he did so within a reasonable time after he discovered the alleged fraud. *Clements vs. Smith's Adm'r*, 156.
2. The party defrauded has the option of acquiescing in the agreement or of avoiding it, but if he elect the latter, he is bound to manifest his determination within a reasonable time after discovery of the fraud. *Ib.*

See FRAUDULENT CONVEYANCES.

INSOLVENT DEBTOR.

FRAUDULENT CONVEYANCES.

1. An assignment of the whole of a debtor's property, which provides that one class of creditors shall be preferred to another, and the surplus, if any remains after payment of all debts, to be paid to the grantor, unless tainted by fraud, is good both at common law, and under the statute of 13th *Elizabeth*. *Beatty vs. Davis*, 211.
2. The reservation in such an assignment of the power to the trustee, to mortgage the property conveyed to him, if he should deem it necessary to do so for the purposes of the trusts, does not vitiate the conveyance. *Ib.*
3. To render a deed of this description void under the insolvent laws, there must be a two fold intent, the intent to apply, and the intent to prefer. *Ib.*
4. The common law has always sanctioned the right of one creditor to obtain the payment, or security of his debt, from the debtor, to the exclusion of other creditors. *Powles, et al., vs. Dilley, et al.*, 222.

FRAUDULENT CONVEYANCES.—Continued.

5. To render a transfer to a favored creditor void under the insolvent system, the debtor must intend both to apply for the benefit of the insolvent laws, and intend to prefer the particular creditor or creditors; the guilty intent must concur in both particulars. *Ib.*
6. To ascertain this intent, all the facts and circumstances surrounding the case must be brought into view, and the court are as free to infer it from circumstances, as if it had been expressed by the party. *Ib.*
7. But the inference must be a fair and justifiable one from all the facts; one that leaves no doubt in the mind, that the party at the time contemplated an application for the benefit of the insolvent laws; and it is incumbent on the complainant to establish this motive when it is denied by the answer. *Ib.*
8. Where an assignment is assailed as a fraud upon the insolvent laws, the declarations of the parties to it, made at the time, showing that it was only executed after urgent persuasions on the part of the creditor, are admissible as part of the *res gesta*, to explain the motive and circumstances surrounding the assignment. *Ib.*
9. It is no objection to the validity of this assignment that it was made after the filing of a former bill, against the same parties, which was subsequently dismissed, and the existence of which was not known to the parties until after the assignment was made, which was done before the institution of the present suit. *Ib.*

See **INSOLVENT DEBTOR**, 5.

FREEDOM, PETITION FOR, &c.

See **NEGROES AND SLAVES**.

GUARDIAN AD LITEM.

See **PRACTICE IN CHANCERY**, 11 to 14.

HOTCHPOT.

1. The position that the distribution of realty with personality in *hotchpot*, is a legal or proper subject for the action of an orphans court, is not sanctioned by authority. *Hayden vs. Burch, et al.*, 79.
2. The provision of the act of 1798, which requires the settlement or portion advanced in the lifetime of the intestate, to be brought into *hotchpot*, can be applied only to a case of total intestacy. *Ib.*

See **ADVANCEMENT**.

HOWARD DISTRICT.

See **APPEAL**.

CONSTRUCTION OF ACTS AND STATUTES, 50, 51, 52.

INSOLVENT DEBTOR, 25.

HUSBAND AND WIFE.

1. A debt due by the wife before marriage, was presented to the husband during coverture, who promised to pay it "if the plaintiff would wait a few days." **HELD:** That the plaintiff could recover against the husband on this promise, though the wife died before he brought his action. *Cook vs. Durall*, 460.

See **WILL AND TESTAMENT**, 13

INADEQUACY OF PRICE.

1. Mere inadequacy of price, unattended by fraud or circumstances of suspicion, is no ground of objection where the contract is fair and voluntary, and will not influence a court of equity against enforcing a specific performance, where no undue advantage is taken. *Shepherd vs. Bevin*, 32.

INFANCY, INFANTS.

See PRACTICE IN CHANCERY, 11 to 14.

INJUNCTION.

1. Upon a bill for a discovery as to the ownership of a certain draft, upon which suit had been instituted in the names of the defendants against the complainant, the answer disclosed all the facts within the knowledge of defendants, and leaves the consequences of these facts, as far as they affect the ownership of the draft, to the court. HELD: That this answer was sufficient to entitle the defendant to a dissolution of the injunction granted upon the bill. *Adams, Survivor of Burckmeyer and Adams vs. Whiteford*, 501.

INSOLVENT DEBTOR.

1. A testatrix devised by her will, the residuum of her estate to her nephews and nieces, "share and share alike." Subsequent to the execution of this will, she advanced large sums of money to one of the residuary legatees, who, prior to the death of the testatrix, received the benefit of the insolvent laws, and his permanent trustee was duly appointed. HELD: That in paying this legacy, the executor had the right and was bound to discount therefrom the loans made to the legatee by testatrix subsequently to the date of her will, and this balance alone passed to and could be recovered by the trustee in insolvency. *Smith and Talbott, vs. Donnell*, 84.
2. Under the fifth section of the act of 1805, ch. 110, no more of a devise or bequest to an insolvent could be obtained by creditors, than could have been obtained by them if no insolvent discharge had intervened. The devise vested not in the trustee, but remained in the insolvent debtor, subject to the race of diligence on the part of his creditors. *Ib.*
3. The second section of the act of 1834, ch. 293, designed to accomplish nothing but to put an end to this race of diligence amongst creditors, by transferring to the trustee such rights as would otherwise have remained in the insolvent, and thus secure an equal distribution of his property. *Ib.*
4. An assignment by a debtor in failing circumstances, of all his property, without restriction, for the benefit of all his creditors, without favor or preference, is good at common law, and can only be questioned when it contravenes the express provisions of the insolvent laws. *Malcolm vs. Hall*, 177.
5. If such assignments be executed with a view to give an undue and improper preference, when the grantor had no reasonable expecta-

INSOLVENT DEBTOR.—*Continued.*

- tion of being exempted from liability, for or on account of his debts, without applying for the benefit of the insolvent laws, then the law denounces them, and the trustee in insolvency afterwards appointed, may avoid them. *Ib.*
6. Mere proximity in point of time, between the date of the assignment and the application for the benefit of the insolvent laws, standing alone, without any supporting circumstances, is not to be received as adequate or reliable proof of what the insolvent intended or anticipated at the time of executing the assignment. *Ib.*
 7. A denial in an answer upon oath, that the assignment was made with a view of an application for relief under the insolvent laws, though coming from the grantee and not the insolvent, is sufficient to put the complainant upon his proof. *Ib.*
 8. The policy of the insolvent laws rather favors than discountenances such assignments as are made for the equal and indiscriminating benefit of all the creditors. *Ib.*
 9. An assignment of the whole of a debtor's property, which provides that one class of creditors shall be preferred to another, and the surplus, if any remains after payment of all debts, to be paid to the grantor, unless tainted by fraud, is good both at common law, and under the statute of 13th *Elizabeth*. *Beatty vs. Davis*, 211.
 10. The reservation in such an assignment of the power to the trustee, to mortgage the property conveyed to him, if he should deem it necessary to do so for the purposes of the trusts, does not vitiate the conveyance. *Ib.*
 11. To render a deed of this description void under the insolvent laws, there must be a two-fold intent, the intent to apply, and the intent to prefer. *Ib.*
 12. The circumstances of this case, distinguished from those of *Dulany vs. Hoffman*, 7 *G. & J.*, 170. *Ib.*
 13. The common law has always sanctioned the right of one creditor to obtain the payment, or security of his debt, from the debtor, to the exclusion of other creditors. *Powles, et al., vs. Dilley, et al.*, 222.
 14. To render a transfer to a favored creditor void under the insolvent system, the debtor must intend both to apply for the benefit of the insolvent laws, and intend to prefer the particular creditor or creditors; the guilty intent must concur in both particulars. *Ib.*
 15. To ascertain this intent, all the facts and circumstances surrounding the case must be brought into view, and the court are as free to infer it from circumstances, as if it had been expressed by the party. *Ib.*
 16. But the inference must be a fair and justifiable one from all the facts; one that leaves no doubt in the mind, that the party at the time contemplated an application for the benefit of the insolvent laws; and it is incumbent on the complainant to establish this motive where it is denied by the answer. *Ib.*

INSOLVENT DEBTOR.—*Continued.*

17. Where an assignment is assailed as a fraud upon the insolvent laws, the declarations of the parties to it, made at the time, showing that it was only executed after urgent persuasions on the part of the creditor, are admissible as part of the *res gesta*, to explain the motives and circumstances surrounding the assignment. *Ib.*
18. It is no objection to the validity of this assignment that it was made after the filing of a former bill, against the same parties, which was subsequently dismissed, and the existence of which was not known to the parties until after the assignment was made, which was done before the institution of the present suit. *Ib.*
19. If property in the hands of an insolvent's trustee is not secure, and is about to be wasted and applied by the trustee to his own use, a court of equity may interfere to prevent the abuse of the trust, until the proper remedy can be applied, provided the mischief be irreparable, or the consequences of such a character as to be without relief, except in equity. *Ib.*
20. But where there is adequate remedy pointed out by law, equity will not interfere; more especially where the party sought to be affected by the proceeding, derives his power under a special jurisdiction, and is made responsible to that jurisdiction for the exercises of his trust. *Ib.*
21. The court of chancery has no jurisdiction over the appointment and removal of trustees of insolvent debtors, the whole subject being regulated by statutes, and resting with the courts of law. *Ib.*
22. The whole administration of the insolvent's assets, is confided exclusively to the courts of law. *Ib.*
23. Where the question of the appointment of an insolvent trustee arises incidentally in other courts it is not competent there to inquire, whether he was rightfully appointed or not. *Ib.*
24. It is the policy of the insolvent laws of this State to require nothing more from insolvent debtors than an honest and full surrender of their estates for the benefit of their creditors, to entitle them to a personal discharge from their debts. *Baylies & Tyson vs. Elliott*, 452.
25. A debtor applied, on the 2nd of July, 1850, to a justice of the orphans court of *Howard* district, for the benefit of the insolvent laws. He had resided in *Howard* district for twelve months immediately preceding his application, but for the residue of the two years had resided in *Baltimore* city. He presented with his petition a certificate of the clerk of *Howard* district, that he had not, within two years, applied for the benefit of the insolvent laws of the State, but did not present a similar certificate from the clerk of *Baltimore* county. He received his personal discharge, and failing to give notice to his creditors, as required by the order of the justice, on the 20th of December, 1850, *Howard* district court, before whom said order required him to appear, ordered the time of publication to be extended.

INSOLVENT DEBTOR.—Continued.

HELD: That the defects, if any, in these proceedings, are cured by the 2nd sections of the act of 1844, ch. 304, and of the act of 1836, chap. 293. *Ib.*

See **BANKRUPTS.**

INTEREST.

See **WILL AND TESTAMENT**, 18.

PRACTICE IN CHANCERY, 15.

ISSUE.

See **RULE IN SHELLEY'S CASE**, 57.

WILL AND TESTAMENT, 8 to 17.

JUDGMENT OF COURTS OF SISTER STATES.

1. The plaintiff, in proof of his title to sue in the courts of this State, as assignee of a bankrupt, and of his appointment as such assignee under the act of Congress of 1841, offered the proceedings of the circuit court of the *District of Columbia*, sitting in bankruptcy, upon the application of the bankrupt. **HELD:** That the courts of *Maryland* have a right to examine into the validity of these proceedings, and to judge of the sufficiency of such appointment. *Hall vs. Sewell*, 146.

JUDGMENT OF OTHER COURTS.

See **EVIDENCE**, 25, 26.

JUDGMENT BY DEFAULT.

See **PRACTICE**, 47, 48, 50.

JURISDICTION.

1. With the real estate of the deceased, when and how he has disposed of it to his children, the orphans court has no concern: controversies with regard to real estate, must be settled in a different *forum*. *Hayden vs. Burch, et al.*, 79.
2. The position that the distribution of realty with personalty in *hotch-pot*, is a legal or proper subject for the action of an orphans court, is not sanctioned by authority. *Ib.*
3. The acts of Assembly, from which the orphans courts derive their powers, restrict the action of those courts in cases of intestacy, entirely to the personal assets; none of them confer any jurisdiction over the realty, *Ib.*
4. If a master, hearing that his slave is about to file his petition in the county in which he resides, and knowing that the evidence necessary to maintain the petition can be conveniently obtained only in that county, should, in fraud of the jurisdiction of its court, and to prevent a fair and impartial trial of petitioner's claim, remove him to another county, in such case the court of the former county may exercise jurisdiction, and proceed on the petition as if no such removal had been made. *Anderson vs. Garrett*, 120.
5. By the law of this State, as far as regards liberation from slavery

JURISDICTION.—*Continued.*

a negro is regarded as the slave of him by whom he is held in bondage, until his right to freedom is established by the judgment of the court competent to try such right. *Ib.*

6. The court of chancery has no jurisdiction over the appointment and removal of trustees of insolvent debtors, the whole subject being regulated by statutes, and resting with the courts of law. *Powles et al., vs. Dilley et al., 222.*
7. The whole administration of the insolvent's assets, is confided exclusively to the courts of law. *Ib.*
8. The authority of a court of competent jurisdiction, when coming incidentally in question, is conclusive of the matter decided, and cannot be impeached on the ground of *informality* in the proceedings, or mistake or error in the matter on which they have adjudicated. *Ib.*
9. Where the question of the appointment of an insolvent trustee arises incidentally in other courts, it is not competent there to inquire, whether he was rightfully appointed or not. *Ib.*

See ORPHANS COURT, 8.

APPEAL, 3.

JUDGMENT OF COURTS OF SISTER STATES.

COURT OF CHANCERY, 12.

ORPHANS COURT, 27.

LACHES.

See LAPSE OF TIME AND LACHES.

LAND OFFICE.

1. An escheat grant, is prima facie evidence of title. *Clement's Lessee, vs. Ruckle, 326.*

LAPSE OF TIME AND LACHES.

1. An annuity given by will to a widow in lieu of dower, became payable in 1818. No part of this was paid, and no legal steps taken to enforce its payment until 1846, when the widow filed a bill claiming the whole amount of the annuity, with interest, as a charge upon the lands, (now in the hands of *bona fide* purchasers,) devised to the parties, who were, by the will, required to pay it. HELD: That laches and lapse of time was an effectual bar to the claim. *Chew, Exc'r of Gibson, vs. The Farmers Bank, et al., 361.*
2. The fact that she did not know that this annuity was a charge upon the lands until 1839, when she was informed of it by a decision of the Court of Appeals, will not excuse her delay and neglect to proceed against the parties personally responsible for the payment of the annuity. *Ib.*
3. A lapse of twenty-five years from the inception of title, a delay entirely unexplained, and without any claim whatever in the intermediate time being made, is an effectual bar to a claim for rents and profits. *Ib.*
4. The case of *Sellman vs. Bowen, 8 G. & J.*, overrules the case of *Steiger's Adm'r, vs. Hillen, 5 G. & J., 121*, only in so far as the latter case

LAPSE OF TIME AND LACHES.—Continued.

countenances the doctrine, that a widow may, *at law*, recover from the alienee of her husband, damages for the detention of her dower.

Ib.

5. Nothing else in the case of *Steiger's Adm'r vs. Hillen*, is questioned; and that case, so far as the law relating to laches and lapse of time is concerned, is affirmed by the case of *Kiddall vs. Trimble, Exc'r of Jacob*, 8 Gill, 507, and by this case; such ought now to be considered settled law in *Maryland*. *Ib.*

See MISTAKE, 3.

BILLS OF EXCHANGE, &c., 20.

LEGACY, LEGATEE.

See WILL AND TESTAMENT.

PRACTICE IN CHANCERY, 15 to 21.

LEX FORI.

See CONTRACTS, &c., 2.

LEX LOCI.

See CONTRACTS, &c., 2.

LIEN.

See MORTGAGE, &c., 1, 2, 3.

COURT OF CHANCERY, 13.

LIMITATION OF ACTIONS.

1. Where the endorser of a promissory note was sued by the holder, and had paid but *part* of the judgment recovered against him on the note, it was HELD: That he could maintain an action of *assumpsit* against the maker for the part so paid, and that against such an action, the statute of limitations begins to run from the time the money was paid, and not from the maturity of the note. *Bulleck vs. Campbell*, 182.
2. It is now well settled, that in cases of principal and surety, the statute does not begin to run until the payment is made by the latter. *Ib.*
3. Where a security is obliged to make several payments, he may bring several suits for the amounts so paid, and the statute runs against each payment from the time it was made. *Ib.*
4. In an action of *trover*, limitations begin to run from the conversion, unless the plaintiff be prevented by the fraud of the defendant from obtaining knowledge of it; if there is no fraud, the fact that the plaintiff was ignorant of the conversion, will not prevent the running of the statute. *Clarke's Adm'r vs. Marriott's Adm'r*, 331.

See PRACTICE, 40.

LAPSE OF TIME, LACHES.

LIMITATION OVER AFTER FAILURE OF ISSUE.

See WILL AND TESTAMENT, 8 to 17.

LIS PENDENS.

See FRAUDULENT CONVEYANCES, 9.

MAINTENANCE.

See **DEEDS, &c.**, 5.

MANUMISSION.

See **NEGROES AND SLAVES.**

MISTAKE.

1. A party who seeks relief in equity upon the ground of mistake, must produce proof clear and overwhelming of the existence of such mistake. *Beard's Exc'x, vs. Hubble, et al.* 419
2. In all cases of mistake it is required that the party injured by the mistake, should take steps promptly to get relief, and if he is guilty of *laches*, he cannot complain if by reason thereof, he is a sufferer. *Ib.*
3. The complainant gave his note on the 16th of March, 1840, to the testator of one of the defendants, and on the 10th of August of the same year confessed judgment thereon, which, in 1845, was entered satisfied, and on the same day a new judgment was confessed for the amount of the old one, with interest then due thereon. In 1846 this judgment was assigned and entered for the use of the assignee. In 1847 the complainant, the judgment debtor, made a considerable payment to the administrator of the assignee, who afterwards assigned it to the defendant. The complainant then filed his bill in equity, asking relief on the ground that the note and original judgment were founded in mistake. The proof of mistake was not clear and satisfactory, and it was **HELD**: that the complainant was not entitled to relief, and that the assignees of the judgment have a superior equity to any that the complainant has been able to show. *Ib.*

MORE OR LESS.

1. A vendee contracted in writing to purchase "a farm or tract of land, called *Mother's Care*, containing one hundred and seventy-three acres, *more or less*," for which he promised to pay the gross sum of \$2,300. At the time the contract was made, the vendor, when questioned as to the number of acres, told the vendee, that, 'he had heard his brother say, that the old plat called for one hundred and seventy-three acres, but he did not himself know the quantity, never having seen it surveyed. **HELD**: That this statement of the vendor, cannot be considered such a representation as would make it inequitable to compel the vendee to perform the contract, though the farm was found to contain but one hundred and forty-five acres. *Stull vs. Hurtt*, 446.
2. In the absence of a fraud, the words, "*more or less*," must be considered as qualifying the representation of quantity, and neither party can claim relief either for a deficiency or a surplus. *Ib.*

MORTGAGE, MORTGAGOR, MORTGAGEE.

1. A release, of a mortgage recited that the mortgagor had fully paid and satisfied the debt to the mortgagees. On the same day the mortgagor executed a new mortgage to one of the same mortgagees. **HELD**: That this release could not be explained by parol proof, and that by it the mortgagee lost his lien under the first mortgage,

MORTGAGE, MORTGAGOR, MORTGAGEE.—Continued.

and the second mortgage must be postponed to those prior to it in date, though junior to the first mortgage. *Woollen's Excr's vs, Hillen*, 185.

2. It is well settled, that where there are two mortgagees, under separate and distinct mortgages from the same mortgagor, and the prior mortgagee has a lien on two distinct funds, and the second on one of them only, equity will, for the protection of the subsequent incumbrancer, compel the prior incumbrancer to resort to that fund on which the second has no lien. *Ib.*
3. But this rule does not apply to a case where the prior mortgagee has a lien on two distinct estates of two separate and distinct mortgagors, and the subsequent mortgagee holds a lien on one only of these estates, encumbered by the prior mortgage. *Ib.*
4. Where a mortgage contains no covenant, that the mortgagor shall remain in possession until forfeiture, the mortgagee is to be deemed the owner of the property. *Leighton vs. Preston, et al.*, 201.
5. Where a testator devises land which he had previously mortgaged, and charges it in the hands of the devisee, with a provision for his wife in lieu of her dower, which provision the widow accepts, and the land is sold to pay the mortgage debt, she may have a preferred claim upon the surplus proceeds of sale, as against the devisee, but she has no claim against the mortgagee. *Chew Exc'r of Gibson, vs. The Farmers Bank et al.*, 361.
6. A widow has no claim under her husband's will to lands which he had previously mortgaged, and which it becomes necessary to sell to pay the mortgage debt; she is entitled to dower in the mortgaged land, but if she elects to abide by the will, she has no longer any claim to the land. *Ib.*
7. No offer by the husband, though accepted by the wife, will deprive a mortgagee of his security; they cannot make mortgaged premises answerable for the widow's claim for dower in other lands. *Ib.*
8. A widow may recover dower before foreclosure of a mortgage, but after the sale of the mortgaged premises, she has no claim. *Ib.*

See ASSUMPSIT, 2.

NEGROES AND SLAVES.

1. By the law of this State, as far as regards liberation from slavery, a negro is regarded as the slave of him by whom he is held in bondage, until his right to freedom is established by the judgment of the court competent to try such right. *Anderson vs. Garrett*, 120.
2. By the act of 1796, ch. 67, sec. 21, the county court of that county in which the petitioner or petitioners shall reside, under the direction of his, her or their master or mistress, or owner, are exclusively vested with the power of trying the petition for freedom. *Ib.*
3. In acquiring a residence the slave has no will of his own; his acts, unauthorised by his master, and his volition, form no ingredient in the constitution of his residence; its creation and continuance depend entirely upon the acts and intentions of the owner, whose

NEGROES AND SLAVES.—*Continued.*

power of changing it at his will and pleasure rests entirely in his own discretion. *Ib.*

4. A master apprehending that a family of slaves whom he had permitted, for nearly eighteen years, to live and reside in the city of *Baltimore*, acting as free persons, were about to abscond, seized, and forcibly carried them to another county, beyond the jurisdiction of *Baltimore* county court. **HELD:** That he had a perfect right thus to change the residence of his slaves, and the court from whose jurisdiction they were thus taken, could not entertain their petition for freedom. *Ib.*
5. If a master, hearing that his slave is about to file his petition in the county in which he resides, and knowing that the evidence necessary to maintain the petition can be conveniently obtained only in that county, should, in fraud of the jurisdiction of its court, and to prevent a fair and impartial trial of petitioner's claim remove him to another county, in such case the court of the former county may exercise jurisdiction, and proceed on the petition as if no such removal had been made. *Ib.*
6. Upon a suggestion for the removal of a petition for freedom, under the 3rd section of the act of 1810, ch. 63, the county court in determining on the sufficiency of the suggestion, is confined to the competent testimony offered in its support, and cannot receive any evidence offered by the opposite party. *Ib.*
7. The clause of this act which requires the petitioner to be "actually held in bondage" by the person claiming to be owner, and asking for the removal, means a holding in bondage, in *point of fact*, and not a mere legal or constructive holding. *Ib.*
8. Where the suggestion and affidavits thereto proved that the master actually held in bondage *but one* of the petitioners, while of the others he held only a legal or constructive holding, it was **HELD**, that the county court properly overruled the suggestion for the removal of the petition of *all* the petitioners. *Ib.*
9. A negro's going at large and acting as free for any length of time, will not, *per se*, be a sufficient foundation to presume a deed of manumission. *Ib.*
10. No presumption of a deed of manumission is authorized as a matter of law, to be declared by the court, or as a matter of fact to be found by the jury, upon the mere ground that a slave has gone at large and acted as a freeman, with his master's knowledge, unless such going at large and acting as if free, be for a period of at least twenty years uninterrupted duration. *Ib.*
11. Abandonment of a slave by the owner, is not a legitimate mode of manumission in this State, nor is it, *per se*, a sufficient foundation for the presumption of a deed of manumission. *Ib.*
12. An executor as such, has no power in this State to execute a deed of manumission, and no presumption of law or fact that such deed was executed by an executor, can ever arise. *Ib.*

NEGROES AND SLAVES.—Continued.

13. A testatrix desired all her negroes to be liberated, and declares that they are, "by this my will, liberated and set free in the manner and form following:" She then enumerates three who are to be free at her death, and then proceeds, "my negro woman *Beck*, and my negro man *Basil*, to be free at the expiration of four years from the date of my decease," and then enumerates others who were to be free with their increase at the age of twenty-five years. **Held:** that the issue of *Beck* have no claim to freedom under this will. *Ib.*
14. On a petition for freedom it was proved that *Rachael*, the mother of the petitioners, was permitted by her mistress in the spring of 1831, to go and live with *Aaron* her reputed husband, under an agreement between the mistress and *Aaron*, that he should have *Rachael* free forever thereafter, upon condition that he would raise and support for her mistress two of *Rachael's* children then born. At that time *Rachael* was thirty-five years of age, and able to work and gain a sufficient livelihood and maintenance, and has ever since up to the trial of the case in April 1851, gone at large and acted as a free woman, and was still at large and so acting, never having been molested by her mistress, who died 1846, (and who during her life knew of and assented to *Rachael's* so going at large and acting as free,) nor by her representatives since her death. The petitioners were born whilst *Rachael* was so going at large, and filed their petition for freedom in March 1849. **Held:**
- 1st. That it is competent for the jury to presume from these facts that her mistress legally manumitted *Rachael* before the birth of the petitioners, and that it was not necessary to prove that *Rachael's* mistress manumitted them or either of them, by a deed executed according to the act of 1796, ch. 67, by the actual production of such deed
- 2nd. That the jury from these facts ought to presume that *Rachael* was legally manumitted at the time she was first suffered to go at large, and that her children born while she was so going at large are entitled to their freedom. *Henderson vs. Jason, et al.*, 483.

See CONSTRUCTION OF ACTS AND STATUTES, 32, 33.

NOTICE.

1. Notice to one partner of a firm, is notice to all. *Baughers Exc'rs, vs. Duphorn, et al.*, 314.
2. Where the title to a negro accrues by forfeiture under the act of 1817, ch. 112, notice or knowledge to the reversioner is not necessary in order to bar his claim by the right of possession. *Clarke's Adm'r, vs. Marriott's Adm'r*, 331.

See PRACTICE, 44.

PRINCIPAL AND SURETY, 4, 6.

PRACTICE IN CHANCERY, 13.

NUDUM PACTUM.

1. A promise made by the payee and holder of a promissory note to the

NUDUM PACTUM.—*Continued.*

maker upon maturity of the note, that the latter might retain the money due on it for a longer time, being without consideration is a *nudum pactum*, and does not release parties liable as endorsers or securities upon the note. *Hoffman & Rizer vs. Coombs*, 284.

NUNCUPATIVE WILLS.

1. The true construction of the 2nd section of the act of 1810, ch. 34, relating to nuncupative wills, requires, that the testamentary words, or the substance thereof, should be reduced to writing, within six days after they were uttered and shown to and approved of, as correct, by *each* of the attesting witnesses. *Welling vs. Owings*, 467.
2. The word "testimony," used in this section, applies to the nuncupation itself, and not to the prerequisites required by the 1st section, which may be established at any time before the paper is admitted to probate. *Ib.*
3. The testamentary words must be rendered to writing, and seen by, and found to be correct, by *each* of the attesting witnesses, within the period limited by the 2nd section of this act. *Ib.*
4. Where testamentary words were reduced to writing by one of the witnesses, and shown by him to another, within the time prescribed by the act, but were not reduced to writing by the third witness, nor seen by him until more than twelve months after the testator's death. **Held:** That such words could not be admitted to probate. *Ib.*

ORPHANS COURT.

1. The principle of law applicable to the trial of issues from the orphans courts, and of issues to be followed by judgments, are precisely the same. *Ramsay & Jenkins vs. Glass, et al.*, 56.
2. With the real estate of the deceased, when and how he has disposed of it to his children, the orphans court has no concern: controversies with regard to real estate, must be settled in a different *forum*. *Hayden vs. Burch, et al.*, 79.
3. The position that the distribution of realty with personality in *hotchpot*, is a legal or proper subject for the action of an orphans court, is not sanctioned by authority. *Ib.*
4. The acts of Assembly, from which the orphans courts derive their powers, restrict the action of those courts in cases of intestacy, entirely to the personal assets; none of them confer any jurisdiction over the realty, *Ib.*
5. The provision of the act of 1798, which requires the settlement or portion advanced in the lifetime of the intestate, to be brought into *hotchpot*, can be applied only to a case of total intestacy. *Ib.*
6. A testatrix devised by her will, the residuum of her estate to her nephews and nieces, "share and share alike." Subsequent to the execution of this will, she advanced large sums of money to one of the residuary legatees, who, prior to the death of the testatrix, received the benefit of the insolvent laws, and his permanent trustee

ORPHANS COURT.— *Continued.*

- was duly appointed. **Held:** That in paying this legacy, the executor had the right and was bound to discount therefrom the loans made to the legatee by testatrix subsequently to the date of her will, and this balance alone passed to and could be recovered by the trustee in insolvency. *Smith and Talbott. vs. Donnell*, 84.
7. The orphans court has no authority to direct a collector *pendente lite*, to pay a sum of money to persons named as executors in a will, to be appropriated as fees to counsel employed to resist a *caveat*, interposed *before the will was admitted to probate*. *Townshend vs. Brooke*, 90.
 8. The orphans courts are tribunals confessedly special and limited in their jurisdiction, without any constructive or incidental power, and can exercise no authority whatever, not expressly given by law. *Ib.*
 9. Where a *caveat* is filed *after* the will is admitted to probate, and letters testamentary granted to the executors, authority in the orphans court to allow such executors counsel fees to resist the *caveat*, is expressly granted by the act of 1798, ch. 101, sub-ch. 10, sec. 2. *Ib.*
 10. A testatrix executed her will in 1804, and appointed an executor, but desired that no letters of administration be taken out on her estate. **Held:** that the isolated fact that the person named as executor sold the rest of the negroes, except the petitioner, belonging to her estate, is not evidence legally sufficient to warrant the jury in finding that such executor acted under letters testamentary, legally granted. *Anderson vs. Garrett*, 120.
 11. An executor as such, has no power in this State to execute a deed of manumission and no presumption of law or of fact that such deed was executed by an executor can ever arise. *Ib.*
 12. Where the contents of a will improperly destroyed, are satisfactorily proved by witnesses, they will be established as the will, but the policy of the law, which throws around wills more protections than to any other mode of conveyance, requires such contents to be proved by the clearest, the most conclusive and satisfactory proof. *Rhodes, et al., vs. Vinson, et al.*, 169.
 13. The proof of the *entire* contents must be conclusive and satisfactory. *Ib.*
 14. Where the order of an orphans court revoking letters of administration, has been appealed from, the appeal suspends the order of revocation, and leaves the letters in full force and effect, pending the appeal. *State use of Calvert, vs. Williams*, 172.
 15. The granting of letters of administration, is a revocation of letters of administration *pendente lite*. *Ib.*
 16. Where objection is made to the grant of letters, and an appeal is taken from the order granting them, while that appeal is pending the letters cannot be granted. *Ib.*

ORPHANS COURT.—*Continued.*

17. The finding of a jury upon the trial of issues framed upon a *caveat* to a will, is conclusive, with respect to all questions touching the validity of the will. *Glass et al., vs. Ramsey and Jenkins*, 456.
18. But when such a verdict is introduced to defeat a claim by the executors, for costs and expenses incurred in resisting the *caveat*, upon the ground that it imputed fraud to the executors in the procurement of the will, it is collaterally introduced, and is open to examination. *Ib.*
19. After probate of a will and grant of letters testamentary, counsel fees and costs will be allowed to the executors for resisting a *caveat* to the will, and such executors will also be allowed their commissions. *Ib.*
20. An intestate died leaving a brother and three sisters. The oldest sister, who was also older than the brother, was unmarried. The other sisters were married. **Held:** That the eldest sister was entitled to administration upon the estate, and could only be excluded upon the representation or impression of an indefinite absence from the State. *Owings vs. Bates*, 463.
21. The husband of one of the unmarried sisters has no right to supersede the eldest sister in her rightful claim to the administration, without the consent, or without notice to the other parties. *Ib.*
22. Where a distributee stands in the relation both of debtor and creditor to the estate, and there are other parties who are entitled to administer, it would be derogatory to sound principles of justice to commit the administration of the estate to him. *Ib.*
23. It was agreed, at an interview between all the distributees, that the eldest sister, the one entitled to administration, should administer the estate, the husband of one of the younger sisters being at the time present, and disclaiming all right or intention to apply for the administration. On the 26th of December, the eldest sister left the State on a temporary sojourn in the *District of Columbia*, with the intention, expressed and understood, of returning within the ensuing month to apply for the administration. On the 6th of January following, the said husband of the younger sister, without notice to, or consent of, the other parties, applied for and obtained the administration. **Held:** That under these circumstances, the grant of letters to him was premature and improvident, and should be revoked. *Ib.*
24. The true construction of the 2nd section of the act of 1810, chap. 34, relating to nuncupative wills, requires, that the testamentary words, or the substance thereof, should be reduced to writing, within six days after they were uttered and shown to and approved of, as correct, by each of the attesting witnesses. *Welling vs. Owings*, 467.
25. The word "testimony," used in this section, applies to the nuncupation itself, and not to the prerequisites required by the 1st section, which may be established at any time before the paper is admitted to probate. *Ib.*

ORPHANS COURT.—Continued.

26. The testamentary words must be reduced to writing, and seen by, and found to be correct, by *each* of the attesting witnesses, within the period limited by the 2nd section of this act. *Ib.*
27. Where testamentary words were reduced to writing by one of the witnesses, and shown by him to another, within the time prescribed by the act, but were not reduced to writing by the third witness, nor seen by him until more than twelve months after the testator's death. **Held:** That such words could not be admitted to probate. *Ib.*
28. A devisee of lands under a will, applied to the orphans court to have the rental proportion of certain crops, growing upon said lands at the death of the testator, stricken from the inventory of the personal estate in which it had been included and returned. Only one of the three executors answered this petition, and the court passed an order granting the prayer of the petition. **Held:**
 - 1st. That all the executors had an equal interest in the matter in controversy and the order should be reversed for want of proper parties, if for no other reason.
 - 2nd. That the orphans court had no jurisdiction over the subject matter, in the manner in which the proceedings were brought before it.
 - 3d. That the devisee has sustained no such injury or invasion of his rights as would entitle him to seek redress therefor in the orphans court.
 - 4th. If his possessory rights to the property are involved by this appraisal, he must assert them before the appropriate tribunals of the State, in the same manner as if the injury had been perpetrated by any private individual. *Spencer Exc'r of Ragan, vs. Ragan*, 480.
29. Issues framed upon a *caveat* to a will, and sent by the orphans court to the county court for trial, may be removed to any adjoining county for trial. *Townshend vs. Townshend*, 506.

See **WILL AND TESTAMENT**, 1 to 5.

PRACTICE, 11, 12, 13.

PAROL PROOF.

See **SPECIFIC EXECUTION, &c.**, 1, 5.

EVIDENCE, 2, 13, 14, 15, 17, 35.

RECEIPTS.

PARTIES TO SUITS.

See **ORPHANS COURT**, 27.

PARTITION.

See **COPARCENERS**, 2.

PARTNERSHIP, PARTNERS.

See **NOTICE**, 1.

RECEIVER, 2 to 8.

PART PERFORMANCE.

See **SPECIFIC EXECUTION, &c.**, 1, 5, 6.

PAWNOR, PAWNEE.

See **TROVER**, 7.

PERPETUITY.

See **WILL AND TESTAMENT**, 15, 16.

PERSONALTY, LIMITATION OF.

See **WILL AND TESTAMENT**, 8 to 17.

POSSESSION OF LANDS.

See **ADVERSE POSSESSION**.

POSSESSIO PEDIS.

See **ADVERSE POSSESSION**, 1.

PLEAS AND PLEADING.

1. Where a suit is brought against an executor who dies after nar filed, and the admr. d. b. n. c. t. a. is made a party, it is not necessary to file a new nar. *Mitchell's Adm'r, vs. Williamson's Exc'rs.* 71.
2. Where under leave to amend and plead *de novo*, new pleas are filed, those before in the case are, of course, withdrawn. *Ib.*
3. When a plaintiff takes issue in fact upon an allegation not constituting a legal bar to his action, he cannot ask the court to rule out testimony in proof of such allegation. *Ib.*
4. To an action on a collector's bond, the defendants pleaded in bar, four pleas, upon three of which, the plaintiff joined issue, but demurred to the *second*. This demurrer the court sustained. The cause was then tried on the issues joined on the other pleas, and the verdict and judgment were for defendants, and the plaintiff appealed. No appeal was taken by defendants from the judgment of the court sustaining the plaintiff's demurrer to the plea. **Held**: that the correctness of the opinion of the court as to the validity of the second plea, is not open for examination on this appeal by the plaintiff. *State vs. Milburn, et al.*, 97.
5. A prayer, that if the jury find certain enumerated facts, "then the plaintiff is not entitled to recover," is based, not on the pleadings, but on the proof, and in granting the instruction, the court are to be considered as placing their opinion, not on the structure of the pleadings, but on the broad ground that if the jury find the facts as stated, the plaintiff cannot maintain his action. *Ib.*
6. In an action of covenant, where the plaintiff in his declaration assigns particular breaches, the defendant cannot plead general performance, he must meet the allegations of the particular breaches. *Marshall vs. Hancy*, 251.
7. To an action of false imprisonment, the defendant pleaded in justification, that he was sheriff and arrested the plaintiff by virtue of process; to this plea the plaintiff replied, that when so arrested he tendered a bail piece to defendant, which the latter refused to accept. **Held**: That this replication was faulty, and could not be sustained. *Yingling vs. Hoppe*, 310.
8. A general demurrer opens not only the pleading demurred to, but the

PLEAS AND PLEADING.—Continued.

- entire record, and judgment will be given against the party who commits the first fault: but there is an exception to this rule, where the replication to an insufficient plea, is not only defective in matter, but also shows that the plaintiff has no cause of action. *Ib.*
9. A plea justifying the arrest or imprisonment of the plaintiff, on the ground that defendant was sheriff at the time, need not answer such matters set out in the declaration, as would have given the plaintiff a good cause of action against a private person. *Ib.*
 10. The plea of *son assault demesne* to a declaration for an assault and battery, need not traverse such matters alleged, as that "of his life it was greatly despaired." *Ib.*
 11. The absence of an *absque hoc*, or a *protestando*, or the want of an averment, that the trespass justified, is the same trespass that is complained of, cannot be taken advantage of on general demurrer. *Ib.*
 12. A plea must either deny the cause of action or confess and avoid it, and if it do not confess the cause of action, the plaintiff may demur specially for that cause. *Ib.*
 13. The fact traversed, should be so material and essential a part of the cause of action or defence, as denying it with success, will destroy the cause of action or defence. *Ib.*
 14. Matters of aggravation need not be answered by the plea, and the plaintiff in a case like this must rely upon them in his replication, or there must be a new assignment. *Ib.*

See **TROVER**, 11.

PRACTICE.

PRACTICE IN THE COURT OF APPEALS.

PRACTICE.

1. The defendant in an action of trover, cannot prove that the title to the property in dispute was not in the plaintiff, but was at the time of the conversion outstanding in a third party, with whom defendant had no connection or privity, either to defeat the action or in mitigation of damages. *Harker vs. Dement*, 8.
2. A defendant in trover cannot set up property in a third person, without showing some title, claim or interest in himself, derived from such person. *Ib.*
3. In an action of trespass or trover by a termor against his reversioner, for an unauthorised interruption of his possession during the term, the measure of damages is the actual loss sustained by the lessee. *Ib.*
4. But in such an action against a stranger and wrong doer, the termor is treated as the absolute owner of the property, and he is entitled to recover its full value. *Ib.*
5. The termor being bound to restore the property to the person from whom he obtained it, or to stand responsible in damages for its full value, has the right to recover its full value from a stranger, who has wrongfully deprived him of it. *Ib.*

PRACTICE — *Continued.*

6. Upon the ground of ulterior responsibility, the borrower of a chattel may maintain an action of trespass or trover against a wrong doer, who has violated his possession, and recover the full value of the property of which he was dispossessed. *Ib.*
7. A pawnee of goods may maintain trespass against a stranger, who takes them away and recover their whole value in damages, though they were pledged to him for less, because he is answerable for the excess to the owner. *Ib.*
8. There is no analogy between the case of a termor suing for property wrongfully taken from his possession, and that of a tenant in common, or part owner of a chattel suing for his proportionate share or interest. The latter, unless a plea in abatement is interposed, may recover in trover or trespass his aliquot share, but he is under no ulterior responsibility to his co-tenant. *Ib.*
9. If a defendant in trover or trespass fails to plead in abatement to the suit of one tenant in common, to recover his interest in the chattel, he is precluded from interposing such a plea to a second suit, by another such tenant for his share. *Ib.*
10. The motive by which a defendant was influenced in converting to his own use the property of another, is only admissible when introduced to repel an attempt by the plaintiff to recover from him, in an action of trover, exemplary damages. *Ib.*
11. An instruction given to a jury is not necessarily correct, because it is given in the very words which the court of last resort used in a case where they acted both as judge and jury. *Boeffer vs. Rogers*, 44.
12. An instruction which takes from the jury the inquiry whether the deceased, at the time of preparing the paper, sought to be established as his last will and testament, was of sound and disposing mind and memory, and capable of making a valid contract, is erroneous, where testimony has been offered, going to question his sanity. *Ib.*
13. If there is proof going to show that a paper, not originally intended as a will, was afterwards made such by adoption, or because without any change of purpose, the party was prevented by death from executing a more formal instrument, it is error to grant a prayer which excludes this question from the consideration of the jury. *Ib.*
14. Where a suit is brought against an executor who dies after *nar* filed, and the *admr. d. b. n. c. t. a.* is made a party, it is not necessary to file a new *nar*. *Mitchell's Adm'r, vs. Williamson's Exc'rs*, 71.
15. Where under leave to amend and plead *de novo*, new pleas are filed, those before in the case are, of course, withdrawn. *Ib.*
16. When a plaintiff takes issue in fact upon an allegation not constituting a legal bar to his action, he cannot ask the court to rule out testimony in proof of such allegation. *Ib.*
17. Where the suggestion and affidavits thereto proved that the master actually held in bondage but one of the petitioners, while of the

PRACTICE.—*Continued.*

- others he held only a legal or constructive holding, it was **Held**, that the county court properly overruled the suggestion for the removal of the petition of *all* the petitioners. *Anderson vs. Garrett*, 120.
18. Where a party has pleaded to the jurisdiction, and taken a bill of exceptions to the overruling of the plea, and then offers a prayer to the court founded on the same reasons on which the plea was based, the court is not bound to reiterate its decision, and the refusal to make it by the court's rejecting the prayer, is no ground for reversal of its judgment. *Ib.*
19. A *bona fide* holder of a negotiable note for a valuable consideration, without notice of facts which affect its validity as between antecedent parties, if he takes it by endorsement before it becomes due, acquires a valid title and may recover upon it, although, as between antecedent parties, the transaction may be invalid. *Gwynn & Co., vs. Lee, et al.*, 137.
20. The defendant received a negotiable note, as security for the payment of money borrowed at the time, of him, by the endorsers of the note, without notice that it had been fraudulently obtained from the makers. **Held**, that he could recover upon it. *Ib.*
21. The defendant is not bound to exhaust his remedies against other securities, placed in his hands at the same time for the same debt, before he can enforce payment of such note. *Ib.*
22. A judgment was obtained by the plaintiff upon default of the defendant to answer certain interrogatories filed by defendant, and a writ of inquiry ordered, Upon motion and affidavit of defendant's counsel, alleging surprise in obtaining this judgment, the court ordered it to be stricken out. **Held**: that the power of the court to strike out this interlocutory decree or judgment, is given by the act of 1787, ch. 9. sec. 6. *Hall vs. Sewell*, 146.
23. Where a plaintiff has filed a bill of particulars, he must confine himself to it in his proof, and he cannot propose interrogatories, the answers to which do not relate to the matters in issue. *Ib.*
24. The right of a party who had purchased a slave, warranted by the vendor to be sound, but who proved to be unsound, to rescind the contract does not depend upon the fact that he returned or offered to return the negro within a reasonable time after the sale, but whether he did so within a reasonable time after he discovered the alleged fraud. *Clements vs. Smith's Adm'r*, 156.
25. Where the defendants had offered evidence to show that the negro was unsound before the sale, it is admissible for the plaintiff to rebut this, by evidence going to show that he was sound at a particular time before the sale. *Ib.*
26. Where the appellant is not injured by an instruction it is no ground for the reversal of the judgment, though it may have been erroneously granted. *Ib.*

PRACTICE.—Continued.

27. The party defrauded has the option of acquiescing in the agreement or of avoiding it, but if he elect the latter, he is bound to manifest his determination within a reasonable time after discovery of the fraud. *Ib.*
28. A prayer which might mislead the jury is properly rejected, though, as an abstract question of law, it may be correct. *Ib.*
29. Where the endorser of a promissory note was sued by the holder, and had paid but *part* of the judgment recovered against him on the note, it was **Held**: That he could maintain an action of *assumpsit* against the maker for the part so paid, and that against such an action, the statute of limitations begins to run from the time the money was paid, and not from the maturity of the note. *Bullock vs. Campbell*, 182.
30. If the suit had been instituted upon the note, the endorser would have had to pay the whole note before he could sue for the money paid by him. *Ib.*
31. Where a security is obliged to make several payments, he may bring several suits for the amounts so paid, and the statute runs against each payment from the time it was made. *Ib.*
32. Certain goods were mortgaged by the owners, to the plaintiff, to secure a debt due from the former to the latter. The mortgagors afterwards conveyed the same goods to the defendants, in trust to sell and distribute the proceeds among the creditors of the grantors. The defendants under this deed of trust, sold the goods, and received the proceeds. **Held**: That in making this sale the defendants committed a tort, for which they would be answerable in damages, to the plaintiff, who could either sue for the tort, or waive it and claim the proceeds, to satisfy his mortgage debt, in an action for money had and received. *Leighton vs. Preston, et al.*, 201.
33. On the day after the sale, the mortgagee executed an assignment of his interest in the mortgage, to a third party. **Held**, that this did not give to the assignee a right to sue, in an action of *assumpsit*, in his own name: this action must be instituted in the name of the mortgagee, the party by whose authority the sale, to be a legal one, must have been made at the time it was made. *Ib.*
34. To an action of covenant upon certain articles of agreement, the defendant pleaded performance on his part, upon which plea was the only issue in the case. The plaintiff, besides the written agreement, offered parol testimony, to remove the uncertainty of the description of the land in the agreement, which the county court admitted. The jury gave a verdict for the plaintiff, and assessed damages. **Held**: That this testimony was inadmissible for any purpose under the issue in this case, and as this court cannot say that it had no influence on the jury in assessing the damages its admission is a good cause for the reversal of the judgment. *Taney vs. Bachtell*, 205.

PRACTICE.—*Continued.*

35. Where evidence is offered without its being stated for what purpose it is offered, it is error to reject it if it was admissible for any purpose. *Ib.*
36. A party who cites a witness and examines him, is not at liberty to reject his testimony afterwards. *Powles et al., vs. Dilley et al., 222.*
37. In an action of covenant, where the plaintiff in his declaration assigns particular breaches, the defendant cannot plead general performance, he must meet the allegations of the particular breaches. *Marshall vs. Haney, 251.*
38. The non-production of written instruments, must be accounted for, before evidence of their contents can be given. *Ib.*
39. A party agreed to convey certain lands, in part payment for the purchase money of other lands; in an action for the breach of this agreement. **Held:** That the time at which the breach occurred, was the period at which the value of the lands should be estimated, in assessing damages. *Ib.*
40. The plaintiff's counsel carried his *nars* in several actions against the defendant, to the clerk's office, and gave them to a deputy clerk, who endorsed them "filed." The counsel then offered to deposit them in the usual receptacle for such papers, and they were handed to him for that purpose without any entry on the docket of their being filed. The defendant and his counsel afterwards, at different times before the rule day to plead, called at the office to know if the *nars* had been filed, and were informed by the clerk and his deputies, after examination of the docket and box of deposit, that they were not. When the rule day had expired the plaintiff's counsel called to inquire for the pleas, and on being informed that his *nars* had not been filed, he went to the box in question and produced the *nars* from it. The pleas of not guilty and limitations were, under these circumstances, filed after the rule day. The court on application ordered the plea of limitations to be stricken out, and the case being tried on the general issue to the plea of *non cul.*, the defendant appealed from the final judgment rendered upon the verdict against him. **Held:** That the defendant not being in default, his plea of limitations should have been received, and that this point is sufficiently presented to this court on the appeal from the judgment. *Newcomer vs. Keedy, 263.*
41. It is a leading principle recognised in all courts of justice, that a party shall not be deprived of his plea or defence unless the default or neglect is his own. *Ib.*
42. A *nar* is not filed until it reaches its final place of deposit by the officer entrusted with it. It may be endorsed as filed and yet not actually filed in contemplation of law. The proper evidence that it is actually filed is the clerk's entry on the docket, to which the court and counsel resort as the true record of the pleadings, and where the rules to plead are laid upon the counsel. *Ib.*

PRACTICE.—*Continued.*

43. The party who is to plead can never be in default until the rule is laid, or supposed to be laid. *Ib.*
44. To constitute notice to a defendant that he is under a rule to plead, it should be proved that knowledge of the *nars* being filed, did reach or might have reached him, or that he might have obtained it by reasonable inquiry. *Ib.*
45. The *nar* being mislaid by the act of the plaintiff, the defendant was in no default, and was under no obligation to plead. *Ib.*
46. If a party pleads *payment*, and afterwards substitutes for that plea *non est factum*, the former plea cannot be relied on, to prove the instrument his deed. *Cresap's Lessee, vs. Hulson*, 269.
47. In an action on a collector's bond, the defendant failed to plead, and judgment by default was entered against him. On the same day of the entry of this judgment upon *nil dicit*, the following entry was made on the docket: "judgment for \$30,000 debt, and \$60,000 damages and costs; damages to be released on payment of \$428.28, with interest from 1st of March, 1840, and costs \$9.82." **HELD:** That parol evidence is admissible to prove that this judgment was agreed to be final by confession; that in recording the last judgment it was intended to supersede the judgment by default, and that its remaining on the docket was a clerical error. *Clammer vs. State use of Beall*, 279.
48. No execution could be issued on this judgment in this state of the entries, until the judgment by default is erased and corrected. *Ib.*
49. In an action upon a bond with a collateral condition, the breaches must be somewhere suggested in the pleadings or on the roll. No judgment on such a bond can be final, until the damages are ascertained, and as a proper foundation for this, breaches of the condition must be suggested. *Ib.*
50. The plaintiff may, however, waive a judgment by default, and in lieu of damages assessed upon breaches which he was at liberty to suggest upon the roll, substitute a confession of them by defendant. *Ib.*
51. A general demurrer brings before the court the whole record, and judgment will be rendered thereon against the party who commits the first vice or imperfection in pleading. *Baughers et al., vs. Nelson*, 299.
52. An objection to a witness, on the ground of interest, should be made when the interest of the witness is first disclosed to the party; it must, at least, be made in a reasonable time after it is known. *Baughers's Exc'rs, vs. Duphorn, et al*, 314.
53. The evidence of a witness was suffered to go to the jury without objection, and rebutting testimony was offered, and other witnesses examined, and exceptions taken, during all which time, the deed, disclosing the witness' interest, was in the hands of the counsel of the opposite party. **HELD:** that, under such circumstances, the objection comes too late. *Ib.*

PRACTICE.—Continued.

54. The legal sufficiency of evidence in a question of law of which the court are the exclusive judges. *Clarke's Adm'r, vs. Marriott's Adm'r*, 331.
55. Wherever testimony is so light and inconclusive that no rational well constructed mind can infer from it the fact which it is offered to establish, it is the duty of the court when applied to for that purpose, to instruct the jury that there is no evidence before them to warrant their finding the fact thus attempted to be proved. *Ib.*
56. The question of sale or no sale, is a question of law, and is not to be decided by the opinions of witnesses: it is also a question of law what shall be deemed a delivery upon the sale of goods. *Ib.*
57. An instruction which permits the jury to construe the provisions of an act of Assembly, is erroneous: it is the province of the court to do this. *Ib.*
58. A testator gave to his daughter, by will, one-third of the personal property he might die possessed of, not otherwise willed or disposed of. To an action by the legatee against the executors to recover this legacy, the defendants pleaded that they had paid to the plaintiff the full amount of her proportion of the estate of her father, and on this plea issue was joined. HELD: That under this plea it was competent for the executors to give in evidence a deed, executed by the testator in his lifetime, conveying to his sons one-half of the personal estate of which he might die possessed, in order to reduce the aggregate amount of the estate, out of which plaintiff was to receive her proportion. *Hannon's Exc'rs, vs. State, use of Robey*, 440.
59. A prayer "that the jury must, upon the evidence if believed by them, find a verdict for the defendant," is too general. It does not disclose a specific point or proposition of law, to which the attention of the court was invited, and the decision of which would appear by the record on appeal to this court. This the policy and spirit, as well as the letter of the act of 1825, ch. 117, requires. *Cook vs. Durall*, 460
60. Where a party bound in a particular character to pay a debt, makes a promise to pay it, that promise does not enlarge the obligation so as to make him responsible in another right or character than that in which he was originally bound. *Ib.*
61. But if a man be indebted in *autre droit*, and in consideration of forbearance, to be granted him, assumes payment of such debt, he may bind himself *proprio jure*, *Ib.*
62. A debt due by the wife before marriage, was presented to the husband during coverture, who promised to pay it "if the plaintiff would wait a few days." HELD: That the plaintiff could recover against the husband on this promise, though the wife died before he brought his action. *Ib.*
63. A writ was sued out returnable to the April term of the county court, at which term the defendant appeared, and rule *ner* was laid upon the plaintiff to the next rule day, being the 20th of Septem.

PRACTICE.—Continued.

ber following. The declaration was not filed until the 19th of October, after the rule day. **HELD:** That the plaintiff was in *default*, and that the defendant should be allowed to plead by the next rule day. *Kent vs. McEldery*, 493.

64. Where a plaintiff is in default in not filing his declaration by the rule day, the court will extend the time for filing his declaration. provided he will consent to try or continue the cause at the option of the defendant. *Ib*

See **EJECTMENT** for practice in that action.

ASSUMPSIT. **WILL AND TESTAMENT**, 5.

TROVER. **COVENANT.** **ORPHANS COURT** for practice in that court.

PRACTICE IN THE COURT OF APPEALS.

PRACTICE IN CHANCERY.

PLEAS AND PLEADINGS.

PRACTICE IN CHANCERY.

1. The defendant received a negotiable note, as security for the payment of money borrowed at the time, of him, by the endorsers of the note, without notice that it had been fraudulently obtained from the makers. **HELD:** That it could recover upon it. *Gwynn & Co. vs. Lee, et al.*, 137.
2. Before the makers can ask relief in equity against such a note, they must show that they have a defence of which they cannot avail themselves at law. *Ib*.
3. A denial in an answer upon oath, that the assignment was made with a view of an application for relief under the insolvent laws, though coming from the grantee and not the insolvent, is sufficient to put the complainant upon his proof. *Malcolm vs. Hall*, 177.
4. It is well settled, that where there are two mortgagees, under separate and distinct mortgages from the same mortgagor, and the prior mortgagee has a lien on two distinct funds, and the second on one of them only, equity will, for the protection of the subsequent incumbrancer, compel the prior incumbrancer to resort to that fund on which the second has no lien. *Woollen's Exc'rs vs. Hillen*, 185.
5. But this rule does not apply to a case where the prior mortgagee has a lien on two distinct estates of two separate and distinct mortgagors, and the subsequent mortgagee holds a lien on one only of these estates, encumbered by the prior mortgage. *Ib*.
6. The answer of the debtor, who was made a defendant, responsive to the bill, denying that he made the transfer, with a view or under an expectation of applying for the benefit of the insolvent laws, is conclusive upon the question of intention, unless overcome by the testimony of two witnesses, or of one with corroborating circumstances. *Beatty vs. Davis*, 211.
7. The rule, with but an occasional exception, is well established and of long standing, that the answer of one co-defendant is not to be received against another, because if the complainant wishes to es-

PRACTICE IN CHANCERY.—*Continued.*

- tablish a fact by the evidence of one defendant, he may examine him as a witness, which will afford the co-defendant an opportunity of a cross-examination. *Powles et al., vs. Dilley et al*, 222.
8. But where the complainant calls upon a defendant to answer, he makes the latter a witness, and so far as the answer is responsive to the bill, it must be received against the complainant, and it cannot be excluded because there is a co-defendant in whose favor it may and does consequentially operate. *Ib.*
 9. By the act of 1836, ch. 128, sec. 2, a complainant has authority under the commission in chief, to take all the testimony necessary to sustain his case, as well against defaulting as other defendants, and such commission dispenses with the execution of an *ex parte* commission issued under the act of 1820, ch. 161. *Higgins, et al., vs. Horwitz*, 341.
 10. An interlocutory decree was passed against two defaulting defendants, and an *ex parte* commission ordered. On the same day the guardian of an infant defendant appeared, and a commission was then issued to commissioners, "as named on the part of complainant and defendants," requiring notice to be given "to the respective parties." **HELD:** That this was a commission in chief. *Ib.*
 11. Where an infant answers by guardian, admitting the facts stated in the bill or making no defence, the act of 1836, ch. 128, sec. 1, connects and binds the interest and defence of such infant with that of the other defendants, and the evidence taken for the complainant under a commission issued in due form, necessarily operates against all the defendants. *Ib.*
 12. This act of 1836 assumes for the court the duty to see, that no substantial rights of the infant are injuriously affected by the proceedings under the commission, and in the cause. *Ib.*
 13. Whether notice of the execution of a commission be served on the guardian to the infant or his solicitor, it is in view of the act of 1836, surplusage, and can vitiate nothing that is presumed to have been done under it. *Ib.*
 14. The practice that occasionally occurs, of making the complainant the trustee for the sale of the property under the decree, is objectionable. *Ib.*
 15. A testator devised to his daughter \$200 and a negro woman after the death of his wife. The executors sold the negro and received the proceeds. The daughter, the legatee in remainder, during the life of the widow, the tenant for life, filed her bill in equity against the executors, asking that the proceeds of the negro be brought in and invested for the use of the tenant for life, and after her death, for the use of the complainant. The tenant for life was made a defendant, and the chancellor decreed that the proceeds of sale be brought into court, to be invested according to the prayer of the bill, with the interest that may have accrued thereon. **HELD:** That this decree was erroneous; the tenant for life cannot, in this suit, re-

PRACTICE IN CHANCERY.—*Continued.*

- cover interest on the proceeds of sale. *Steven's Exc'rs vs. Gordy*, 405.
16. The rights of the widow may not be protected by the decree: if she received the legacy, she would have no right to her thirds of the personal estate. *Ib.*
 17. If the tenant for life were dead, and the executors were the persons to deliver the negro to the tenant in remainder, the latter could not in chancery claim the negro without at the same time claiming the \$200. *Ib.*
 18. Upon a bill by a legatee against executors for a legacy, it must be shown, either by proof or the admission of the executors, that there is a sufficiency of assets after the payment of debts, &c., and this allegation need not in equity be denied. *Ib.*
 19. Distribution accounts, filed with answers of the executors, showing a sufficiency of assets, but not introduced into the case as testimony, are not evidence in the cause. *Ib.*
 20. The court of chancery has no power during the life of the tenant for life, to order the proceeds of sale of the negro to be invested for the benefit of the legatee in remainder. While the tenant for life is living, she is the person to claim the negro. *Ib.*
 21. A legatee in remainder may claim an inventory, if one is needed, but cannot call for security. *Ib.*
 22. A decree was passed in September 1828, for the sale of a deceased's real estate to pay his debts, and appointing a trustee to make the sale, who filed his bond, which was approved, but made no report of sales, and nothing further was ever done by him in chancery. In October, 1847, three of the children of the deceased, filed their petition in the case, charging that the trustee had sold the property and received the money, but had never paid over the balance to which they and others were entitled, and praying the appointment of a new trustee to collect and distribute the proceeds of sale. The former trustee being dead, a new trustee was appointed, who gave bond and was proceeding to re-sell the real estate of the deceased, when the purchasers under the original trustee filed their petition averring that they became purchasers of the land from said trustee at public sale, on the 2nd of May, 1829, for a full and fair consideration, which they paid to the trustee, and had ever since been in possession of the said property, and had made improvements thereon. Upon proof establishing the allegations of this petition, it was HELD, that under these circumstances, the sale by the original trustee ought to be affirmed. *Perrin vs. Keithley, et al.*, 412.
 23. It must be a strong case that will justify the appointment of a receiver. The court never exercises this power where it is likely to produce irreparable injustice, or injury to private rights, or where there exists any other safe or expedient remedy. *Speights vs. Peters*, 472.
 24. But in many instances, especially in partnership transactions, where, after dissolution, the parties cannot agree upon an adjustment, and the funds are in the hands of one partner alone, cases must arise for the appointment of a receiver. *Ib.*

PRACTICE IN CHANCERY.—*Continued.*

25. Two parties agreed as joint owners of a vessel to carry freight from *Baltimore* to *San Francisco*, and a portion of the cargo was also a joint concern. The partnership was dissolved by a sale of the vessel at the latter place, and one of the partners then filed a bill for an adjustment of accounts, charging that large proceeds of the adventure were remitted to *A. & Co. of Baltimore*, in whose hands they now are, and avers that they will be lost to the concern if permitted again to come to the hands of the defendant. The answer denies that these funds belong to the concern, but are defendant's own private property. **Held:** As a final adjustment between the parties of all accounts relating to the concern, can alone determine the rightful ownership of these funds, it is proper that a receiver should be appointed, and continued until such adjustment is made. *Ib.*
26. It is not always a necessary condition to the appointment of a receiver, that the court should be satisfied that the property is in imminent peril. Where the fund is *prima facie*, the proceeds of a partnership, it is but a provident exercise of equity power to place it under the care of the court. *Ib.*
27. If one partner in the ordinary course of trade, seeks to exclude another from taking that part in the concern which he is entitled to take, the court will grant a receiver. *Ib.*
28. After dissolution has taken place, or is intended, if one partner acts against the interest of the others, or carries on trade with the partnership funds on his own account, or in any other manner excludes his copartner from that share to which he is entitled in winding up the concern, equity will appoint a receiver. *Ib.*
29. Against the legal title, or a strong presumptive title in the defendant, the court interferes with great reluctance, and only where the property is in danger of being materially injured. *Ib.*
30. A bill was filed by a distributee against the administratrix, for her distributive share of the intestate's estate, alleging herself to be one of the *four* children of the deceased. The bill was taken *pro confesso* against the administratrix, and upon the suggestion of the death of one of the four children, intestate and without issue, the estate was decreed to be distributed among the three remaining children. **Held:** That this decree was erroneous. *Buckley vs. Buckley*, 497.
31. Though one of the children may have died intestate and without issue after the death of the father, the complainant can only claim one-fourth of the estate from the father's administratrix. Her share of her deceased brother's estate, she must claim from his administrator.
32. If the father in fact survived the son, the complainant cannot, under a bill which denies this fact, claim to be entitled to the one-third of the estate. *Ib.*
33. If there were satisfactory proof that there were but *three* children, the

PRACTICE IN CHANCERY.—*Continued.*

complainant cannot contradict her bill which has been taken *pro confesso*. *Ib.*

34. The decree only directed the share of complainant to be paid to her, and took no notice of the shares that had been awarded to the other distributees. **HELD:** That this cannot be right. *Ib.*

35. Upon a bill for a discovery as to the ownership of a certain draft, upon which suit had been instituted in the names of the defendants against the complainant, the answer disclosed all the facts within the knowledge of defendants, and leaves the consequences of these facts, as far as they affect the ownership of the draft, to the court. **HELD:** That this answer was sufficient to entitle the defendant to a dissolution of the injunction granted upon the bill. *Adams, Survivor of Burckmeyer and Adams vs. Whiteford*, 501.

See MISTAKE. RECEIVERS. PRACTICE.

SPECIFIC EXECUTION OF CONTRACTS.

PRACTICE IN THE COURT OF APPEALS.

1. Where a party is not injured by an instruction, he cannot on appeal ask a reversal of the judgment on account of its being granted, even though there may be error in it. *Dakin vs. Pomeroy and Crafts*, 1.
2. To entitle an appellant to a reversal of a judgment on the ground of error in the opinion of the court, it must appear to the appellate tribunal, that he has been or may have been injured thereby, and such liability to injury must appear upon the face of the record. *Ramsay and Jenkins, vs. Glass, et al.*, 56.
3. Where the record does not show that any testimony was given to the jury, on which the opinion of the court could have had the slightest operation, the appellate tribunal will regard such opinion as a mere legal abstraction, and no matter how erroneous it may have been, it will constitute no ground for the reversal of the judgment. *Ib.*
4. To an action on a collector's bond, the defendants pleaded in bar, four pleas, upon three of which, the plaintiff joined issue, but demurred to the *second*. This demurrer the court sustained. The cause was then tried on the issues joined on the other pleas, and the verdict and judgment were for defendants, and the plaintiff appealed. No appeal was taken by defendants from the judgment of the court sustaining the plaintiff's demurrer to the plea. **HELD:** that the correctness of the opinion of the court as to the validity of the second plea, is not open for examination on this appeal by the plaintiff. *State vs. Milburn, et al.*, 97.
5. A prayer, that if the jury find certain enumerated facts, "then the plaintiff is not entitled to recover," is based, not on the pleadings, but on the proof, and in granting the instruction, the court are to be considered as placing their opinion, not on the structure of the pleadings, but on the broad ground that if the jury find the facts as stated, the plaintiff cannot maintain his action. *Ib.*

PRACTICE IN THE COURT OF APPEALS.—*Continued.*

6. Though the county court may err in permitting an immaterial and impertinent question to be asked of a witness, and answered, yet if it does not appear to this court that it had any influence on the jury in their finding on the issues, the judgment will not, for this reason, be reversed. *Anderson vs. Garrett*, 120.
7. Where the appellant is not injured by an instruction, it is no ground for the reversal of the judgment, though it may have been erroneously granted. *Clements vs. Smith's Adm'r*, 156.
8. A prayer which might mislead the jury is properly rejected, though, as an abstract question of law, it may be correct. *Ib.*
9. To an action of covenant upon certain articles of agreement, the defendant pleaded performance on his part, upon which plea was the only issue in the case. The plaintiff, besides the written agreement, offered parol testimony, to remove the uncertainty of the description of the land in the agreement, which the county court admitted. The jury gave a verdict for the plaintiff, and assessed damages. **Held:** That this testimony was inadmissible for any purpose under the issue in this case, and as this court cannot say that it had no influence on the jury in assessing the damages, its admission is a good cause for the reversal of the judgment. *Taney vs. Bachtell*, 205.
10. Where evidence is offered without its being stated for what purpose it is offered, it is error to reject it if it was admissible for any purpose. *Ib.*
11. The docket entries in an ejectment suit, showed that the defendant, the tenant in possession, appeared at the imparlance term, and took defence on warrant under the plea of not guilty, on which issue was joined; and immediately thereupon, without any new declaration against the defendant, followed a judgment, "That plaintiff recover against the defendant his term, and the sum of \$500, his damages claimed in his declaration." Two terms afterwards the plaintiff applied to the court to amend these entries, by striking out the words, "plea not guilty, and defence on warrant," upon the ground that they were interlined by the clerk after the rendition of the judgment. The court ordered the words to be stricken out, and the judgment to stand as rendered for want of a plea; thus making it a judgment upon *nil dicit*. **Held:** That this judgment was erroneous in form and substance, both as it originally stood on the docket, and as corrected by the court. *Cushwa vs. Cushwa*, 242.
12. It is competent for this court to correct these proceedings, upon an appeal from the judgment of the court below, ordering the clerk to strike out the entry of the plea, and suffer the judgment to stand "for want of a plea." The point upon which the judgment is objected to, is distinctly indicated by the rule and order of the court. *Ib.*
13. The act of 1825, chap. 117, does not apply to demurrers, or mo-

PRACTICE IN CHANCERY.—*Continued.*

- tions in arrest of judgment, because these objections being to the pleadings, the whole record is before this court, and the whole is examined to arrive at the proper objections. *Ib.*
14. Where an objection is taken to the admissibility of evidence generally, this court is not prevented by the act of 1825, ch. 117, from examining the pleadings, because the admissibility of the evidence is entirely dependent upon them. *Marshall vs. Haney*, 251.
 15. The plaintiff's counsel carried his *nars* in several actions against the defendant, to the clerk's office, and gave them to a deputy clerk, who endorsed them "filed." The counsel then offered to deposit them in the usual receptacle for such papers, and they were handed to him for that purpose without any entry on the docket of their being filed. The defendant and his counsel afterwards, at different times before the rule day to plead, called at the office to know if the *nars* had been filed, and were informed by the clerk and his deputies, after examination of the docket and box of deposit, that they were not. When the rule day had expired the plaintiff's counsel called to inquire for the pleas, and on being informed that his *nars* had not been filed, he went to the box in question and produced the *nars* from it. The pleas of not guilty and limitations were, under these circumstances, filed after the rule day. The court on application ordered the plea of limitations to be stricken out, and the case being tried on the general issue to the plea of *non cul.*, the defendant appealed from the final judgment rendered upon the verdict against him. **Held:** That the defendant not being in default, his plea of limitations should have been received, and that this point is sufficiently presented to this court on the appeal from the judgment. *Newcomer vs. Keedy*, 263.
 16. Exceptions taken by a party who does not appeal, cannot be introduced into the record on an appeal by the other party. *Hoffman and Rizer vs. Coombs*, 284.
 17. An appeal was taken from *Charles* county court, on the 27th of March, 1846, and the record was not filed in this court until the 25th of May, 1848. The appellee moved to dismiss the appeal, because the record was not transmitted within the nine months, and read a certificate of the clerk of the county, under the seal of the county court, stating that the record was detained in said office by a verbal order of the appellant's counsel. **Held:** That this certificate is not legitimately before this court for any purpose; it has none of the attributes of legal evidence, and the appeal is protected by the act of 1842, chap. 288. *Hannon's Exc'rs, vs. State, use of Robey*, 440.
 18. A prayer "that the jury must, upon the evidence if believed by them, find a verdict for the defendant," is too general. It does not disclose a specific point or proposition of law, to which the attention of the court was invited, and the decision of which would appear by the record on appeal to this court. This the policy and spirit,

PRACTICE IN THE COURT OF APPEALS.—Continued.

as well as the letter of the act of 1825, ch. 117, requires. *Cook vs. Duvall*, 460

See PRACTICE. PRACTICE IN CHANCERY. APPEAL

PRESUMPTIONS OF LAW AND OF FACT

1. A negro's going at large and acting as free for any length of time, will not, *per se*, be a sufficient foundation to presume a deed of manumission. *Anderson vs. Garrett*, 120.
2. No presumption of a deed of manumission is authorised as a matter of law, to be declared by the court, or as a matter of fact to be found by the jury, upon the mere ground that a slave has gone at large and acted as a freeman, with his master's knowledge, unless such going at large and acting as if free, be for a period of at least twenty years uninterrupted duration. *Ib.*
3. An executor as such, has no power in this State to execute a deed of manumission, and no presumption of law or fact that such deed was executed by an executor, can ever arise. *Ib.*
4. Abandonment of a slave by the owner, is not a legitimate mode of manumission in this State, nor is it, *per se*, a sufficient foundation for the presumption of a deed of manumission. *Ib.*
5. On a petition for freedom it was proved that *Rachael*, the mother of the petitioners, was permitted by her mistress in the spring of 1831, to go and live with *Aaron* her reputed husband, under an agreement between the mistress and *Aaron*, that he should have *Rachael* free forever thereafter, upon condition that he would raise and support for her mistress two of *Rachael's* children then born. At that time *Rachael* was thirty-five years of age, and able to work and gain a sufficient livelihood and maintenance, and has ever since up to the trial of the case in April 1851, gone at large and acted as a free woman, and was still at large and so acting, never having been molested by her mistress, who died 1846, (and who during her life knew of and assented to *Rachael's* so going at large and acting as free,) nor by her representatives since her death. The petitioners were born whilst *Rachael* was so going at large, and filed their petition for freedom in March 1849. **Held:**
 - 1st. That it is competent for the jury to presume from these facts that her mistress legally manumitted *Rachael* before the birth of the petitioners, and that it was not necessary to prove that *Rachael's* mistress manumitted them or either of them, by a deed executed according to the act of 1796, ch. 67, by the actual production of such deed.
 - 2nd. That the jury from these facts ought to presume that *Rachael* was legally manumitted at the time she was first suffered to go at large, and that her children born while she was so going at large are entitled to their freedom. *Henderson vs. Jason, et al.*, 483.

See PRINCIPAL AND SURETY, 4, 6.

RULE IN SHELLEY'S CASE, 8. EVIDENCE, 47.

74 v.9.

PRIMOGENITURE.

See RULE IN SHELLEY'S CASE. 6, 8, 11.

PRINCIPAL AND SURETY.

1. A principal in a bond agreed with his sureties, that he would deliver bark taken from the land, for the purchase of which the bond was given to *J. B. & Co.*, and apply the proceeds to the payment of the bond. The payee in the bond assigned it to one of the firm of *J. B. & Co.*, who were not parties to the contract, but afterwards assented that the purchase money of the bark should be so applied; and the bark was sold and delivered to them accordingly. HELD: That it was not competent for the principal, and *J. B. & Co.*, to apply the proceeds of the bark to any purpose inconsistent with such contract, without the consent of the sureties. *Baugher's Exc'rs, vs. Duphorn, et al.*, 314.
2. If *J. B. & Co.* received bark enough to cover the amount of the note, and the assignee assented to the order to pay it, it was paid, and the parties between themselves cannot afterwards revoke the payment, where the rights of third parties are concerned. *Ib.*
3. By such payment the sureties are discharged, and their liability cannot be revived by any subsequent arrangement by the principal and *J. B. & Co.*, to give the fund arising from the bark a different application. *Ib.*
4. This fund was dedicated to the payment of the bond, and the assignee having notice of this fact, and assenting to it, the proceeds of the bark in his hands, were applicable to the bond, in the first instance; and as soon as he became its owner, by assignment, the law regards it as paid. *Ib.*
5. As a general proposition, it is true, that where a contract is made by a principal with a third party, to pay a debt where sureties are concerned, the latter must be parties to such contract, in order to make it binding upon such third party, and irrevocable. *Ib.*
6. But if such third party has, in any way, assented to the application of the fund to a particular debt, with notice that such direction was given to it to indemnify sureties, or if he receives it with that understanding, he has acquiesced in the agreement, and it cannot be changed without the assent of the sureties. *Ib.*
7. A security thus given, and a fund thus pledged, must enure, by operation of law, to the benefit of sureties, and cannot be afterwards diverted to their prejudice, and the depository will be bound to apply it as directed, whether the sureties are expressly parties or not. *Ib.*
8. The assent of *J. B. & Co.*, to apply the proceeds of the bark to the payment of the bond, was sufficient, without their being parties to, or notified of, the contract between the principal and his sureties. *Ib.*

See LIMITATION OF ACTIONS, 2, 3.

PROBATE OF WILLS.

See ORPHANS COURT.

PROMISE.

See PRACTICE, 60, 61, 62.

PROMISSORY NOTES.

See BILLS OF EXCHANGE, &c.

QUIET POSSESSION, COVENANT FOR.

See COVENANT, 8.

RECEIPTS.

1. It is admissible to show by parol, that a receipt executed by the appellant to his mother, stating that he had received from her, as his guardian, the sum of \$571.64, being his distributive share of his father's personal estate, was intended to operate as a payment of so much money upon lands, for the purchase of which he had made a parol agreement with his mother. *Shepherd vs. Bevin, et al.*, 32.
2. Any paper that purports to be a receipt or acknowledgment for the payment of money, may be explained or contradicted. *Ib.*
3. There are many decisions both at law and in equity, which decide that receipts in deeds are only *prima facie* evidence of payment, and that parol evidence is admissible to contradict such receipts, but where fraud is out of the question, there is no decision which goes so far as to decide that parol evidence is admissible, to vary, contradict and render utterly void a solemn deed. *Woollen's Excr's, vs. Hillen*, 185.

See EVIDENCE, 29.

RECEIVERS, APPOINTMENT OF, &c.

1. It must be a strong case that will justify the appointment of a receiver. The court never exercises this power where it is likely to produce irreparable injustice, or injury to private rights, or where there exists any other safe or expedient remedy. *Speights vs. Peters*, 472.
2. But in many instances, especially in partnership transactions, where, after dissolution, the parties cannot agree upon an adjustment, and the funds are in the hands of one partner alone, cases must arise for the appointment of a receiver. *Ib.*
3. Two parties agreed as joint owners of a vessel to carry freight from *Baltimore* to *San Francisco*, and a portion of the cargo was also a joint concern. The partnership was dissolved by a sale of the vessel at the latter place, and one of the partners then filed a bill for an adjustment of accounts, charging that large proceeds of the adventure were remitted to *A. & Co. of Baltimore*, in whose hands they now are, and avers that they will be lost to the concern if permitted again to come to the hands of the defendant. The answer denies that these funds belong to the concern, but are defendant's own private property. HELD: As a final adjustment between the parties of all accounts relating to the concern, can alone determine the rightful ownership of these funds, it is proper that a receiver should be appointed, and continued until such adjustment is made. *Ib.*
4. It is not always a necessary condition to the appointment of a re-

RECEIVERS, &c.—Continued.

ceiver, that the court should be satisfied that the property is in imminent peril. Where the fund is *prima facie*, the proceeds of a partnership, it is but a provident exercise of equity power to place it under the care of the court. *Ib.*

5. If one partner in the ordinary course of trade, seeks to exclude another from taking that part in the concern which he is entitled to take, the court will grant a receiver. *Ib.*
6. After dissolution has taken place, or is intended, if one partner acts against the interest of the others, or carries on trade with the partnership funds on his own account, or in any other manner excludes his copartner from that share to which he is entitled in winding up the concern, equity will appoint a receiver. *Ib.*
7. Against the legal title, or a strong presumptive title in the defendant, the court interferes with great reluctance, and only where the property is in danger of being materially injured. *Ib.*

REMAINDER VESTED.

See WILL AND TESTAMENT, 13.

REMEDY AT LAW.

See COURT OF CHANCERY, 13.

REMOVAL OF CASES.

1. Issues framed upon a *caveat* to a will, and sent by the orphans court to the county court for trial, may be removed to any adjoining county for trial. *Townshend vs. Townshend*, 506.

See NEGROES AND SLAVES, 6, 8.

RENTS AND PROFITS.

See DOWER, 9.

REPRESENTATION OF QUANTITY.

See COURT OF CHANCERY, 14, 15, 16.

RES GESTA.

See EVIDENCE, 21.

RESIDENCE OF SLAVES.

See NEGROES AND SLAVES, 3, 4.

RETROSPECTIVE LAWS.

See CONSTITUTIONAL LAW.

REVOCATION OF WILLS.

1. The destruction of a will in the presence of the testator, or even by his own hands, will not amount to a revocation in law, unless he had at the time capacity to understand the nature and effect of the act, and performed it, or directed it to be performed, freely and voluntarily, with intent to effect a revocation. *Rhodes, et al., vs. Vinson, et al.*, 169.

RULE IN SHELLEY'S CASE.

1. A testator by his will, executed in 1788, devised as follows: "I give and bequeath to my son *I. D.*, the use of the plantation whereon I now live, to him, the said *I. D.*, during his natural life, and if it

RULE IN SHELLEY'S CASE.—*Continued.*

should please God that the said *I. D.* should have *issue* born of his body lawfully begotten, then such *issue* after the death of the said *I. D.*, to have the aforesaid devised premises in fee tail, but if the said *I. D.* should die without *issue* of his body lawfully begotten," then over to his son *T. D.*, in fee simple. HELD: That under this devise, *I. D.* took only a life estate, and not an estate tail general, and that the rule in *Shelley's case* does not apply. *Chelton vs. Henderson's Lessee*, 432.

2. This rule is not an imperious rule of law which must control the operation of a will, no matter how clearly a contrary intention may be expressed upon its face, but it is a rule of construction that must prevail, except in cases where a contrary intention satisfactorily appears by the will itself. *Ib.*
3. It was established in *England* as a convenient and necessary rule of construction, by which the intention of the testator was to be effectuated, not defeated. *Ib.*
4. Even if in such a case in *England*, the technical import of the word "heirs" should be regarded as conclusive evidence of the intent of the testator, that the rule should operate and countervail all other expressions in the will indicating a contrary intent, yet it does not follow that the same principle must govern a case, where the word "heirs," is not used. *Ib.*
5. The word "issue," is a term of equivocal import, being either a word of limitation or of purchase, according to the intent of the testator, deduced from the expressions contained in the will. *Ib.*
6. In *England*, every inference is in favor of the rights of primogeniture, and all presumptions are in favor of the acquisition of title to land, by descent rather than by purchase. *Ib.*
7. In *England*, the word "issue," when used in a will, is construed a word of limitation and not of purchase, unless the intent of the testator to use it as a word of purchase, is so conclusively shown by other expressions, as to repel such an interpretation. *Ib.*
8. In this State, since the act of 1786, no partialities or presumptions in favor of primogeniture or heirs at law, can, as applicable to a case like the present, be said to exist. *Ib.*
9. The right of testamentary disposition, where the intent of the testator satisfactorily appears, is to be favored and fully effectuated, unless in contravention of some established principle of law, over which the intent of the testator can exert no control. *Ib.*
10. Courts of justice will be astute in discovering the real intent of the testator, and the means by which that intent is to be carried into effect. *Ib.*
11. The act of 1786, ch. 45, abolished the right of primogeniture, and made all estates tail general thereafter acquired, to descend as fee-simple estates, and by the act of 1782, ch. 23, an estate in fee-tail may be conveyed in the same manner as an estate in fee-simple. *Ib.*

RULE IN SHELLEY'S CASE.—*Continued.*

12. The clear intent of the testator in this will, was that his son, *I. D.*, should enjoy the plantation during his life, and if he should have "issue," such "issue," after his death, should have the land in fee-tail. *Ib.*
13. The rule in *Shelley's case*, has, in this State, in a case like this, no principle of reason, expediency or policy to sustain it, and it would wholly defeat the clearly expressed intent of the testator. *Ib.*
14. This court cannot assent to the doctrine that the rule in *Shelley's case*, must be applied without reference to testamentary intention, as applying to cases since the act of 1786, ch. 45. That rule is not applicable to a case like this. *Ib.*
15. In construing wills since the passage of the act of 1782 and 1786, we must look not merely to the law as it prevails in *England*, but to its altered condition in this State, since the passage of those acts. *Ib.*

SALES.

1. The right of a party who had purchased a slave, warranted by the vendor to be sound, but who proved to be unsound, to rescind the contract does not depend upon the fact that he returned or offered to return the negro within a reasonable time after the sale, but whether he did so within a reasonable time after he discovered the alleged fraud. *Clements vs. Smith's Adm'r*, 156.
2. The party defrauded has the option of acquiescing in the agreement or of avoiding it, but if he elect the latter, he is bound to manifest his determination within a reasonable time after discovery of the fraud. *Ib.*
3. Proof was offered that a certain *R. P.*, claiming to act as trustee, employed witness to sell all the estate of *Walter Clarke*, and that at the sale he sold the negro woman *Jemima*, to *Caleb*, the brother of said *Walter*, and that *Walter* there delivered the woman to *Caleb*. The witness does not know what was bid for the woman, or whether the money so bid was ever paid; that the woman was never out of possession of *Walter*, except as stated, but continued in his possession to his death, and afterwards with his widow. **HELD:** That this testimony was not sufficient to justify the inference that there was a sale of the negro woman in question from *Walter* to *Caleb Clarke*, and that it was error to permit it to go to the jury for that purpose. *Clarke's Adm'r, vs. Marriott's Adm'r*, 331.
4. This evidence might have led to the conclusion that *Walter*, standing by and remaining silent, while the auctioneer, by direction of *R. P.*, was selling the negro, thus forfeited his title to his brother, provided the latter had, at the time, taken possession, or had ever afterwards claimed the property. *Ib.*
5. The question of sale or no sale is a question of law, and is not to be decided by the opinions of witnesses: it is also a question of law what shall be deemed a delivery on the sale of goods. *Ib.*
6. Every contract obligatory, ought to have a *quid pro quo*, and pay-

SALES.—Continued.

ment ought to be made on the delivery of the goods, except when a future day is agreed on. *Ib.*

7. There must be a delivery of goods with intent to vest the right of possession in the vendee, and there *must be an actual acceptance by the latter*, with intent to take possession as the owner. *Ib.*

SALES BY TRUSTEES IN CHANCERY.

1. A decree was passed in September 1828, for the sale of a deceased's real estate to pay his debts, and appointing a trustee to make the sale, who filed his bond, which was approved, but made no report of sales, and nothing further was ever done by him in chancery. In October, 1847, three of the children of the deceased, filed their petition in the case, charging that the trustee had sold the property and received the money, but had never paid over the balance to which they and others were entitled, and praying the appointment of a new trustee to collect and distribute the proceeds of sale. The former trustee being dead, a new trustee was appointed, who gave bond and was proceeding to re-sell the real estate of the deceased, when the purchasers under the original trustee filed their petition, averring that they became purchasers of the land from said trustee at public sale, on the 2nd of May, 1829, for a full and fair consideration, which they paid to the trustee, and had ever since been in possession of the said property, and had made improvements thereon. Upon proof establishing the allegations of this petition, it was **HELD**, that under these circumstances, the sale by the original trustee ought to be affirmed. *Perrin vs. Keithley, et al.*, 412.

SCIRE FACIAS.

See CORPORATIONS, 10, 11.

SEIZIN.

See ADVERSE POSSESSION, 1.

SET OFF.

See ASSIGNMENT. 2. 3.

SHELLEY'S CASE.

See RULE IN.

SOVEREIGN POWER OF THE STATE.

See CONSTRUCTION OF ACTS, &c., 12 to 15.

SPECIAL CONTRACT.

See ASSUMPSIT, 5, 7.

SPECIFIC EXECUTION OF CONTRACTS.

1. In this case a parol contract for the sale of lands made by the ancestor of the complainant with the defendant, was decreed to be specifically executed upon proof that it was partly performed by delivery of possession in pursuance of the agreement. *Morris vs. Harris*, 19.
2. Mere inadequacy of price, unattended by fraud or circumstances of suspicion, is no ground of objection where the contract is fair and voluntary, and will not influence a court of equity against enforce-

SPECIFIC EXECUTION OF CONTRACTS.—*Continued.*

ing a specific performance, where no undue advantage is taken.
Shepherd vs. Bevin, 32.

3. In an agreement made by a parent with a child, a slight consideration will be sufficient to support it. *Ib.*
4. Money expended in the improvement of lands, on the faith of the contract, constitutes a consideration on which to ground a claim for specific performance. *Ib.*
5. A parol agreement made by the appellant with his mother, that the latter should convey to him certain lands, provided he would relinquish to her his interest in his father's personal estate, was decreed to be specifically executed against the heirs of the mother, upon proof clearly establishing it, and that it had been in part performed by appellant's taking possession and making improvements on the lands, and executing a receipt to his mother, as his guardian, for his share of his father's personal estate, with the understanding that it was to carry out this agreement. *Ib.*
6. This court is not anxious to grasp at slight circumstances, to take a case out of the operation of the statute; nor to allow any latitude of construction, where there is any equivocation or uncertainty. The contract must be clear and definite, and the acts done should be equally clear and definite, and solely with a view to the agreement being performed. *Ib.*
7. A vendee contracted in writing to purchase "a farm or tract of land, called *Mother's Cove*, containing one hundred and seventy-three acres, *more or less*," for which he promised to pay the gross sum of \$2,300. At the time the contract was made, the vendor, when questioned as to the number of acres, told the vendee, that, "he had heard his brother say, that the old plat called for one hundred and seventy-three acres, but he did not himself know the quantity, never having seen it surveyed." HELD: That this statement of the vendor, cannot be considered such a representation as would make it inequitable to compel the vendee to perform the contract, though the farm was found to contain but one hundred and forty-five acres
Stull vs. Hurtt, 446.

STAMP.

See *BILLS OF EXCHANGE, &c.*, 8, 9.

CONSTRUCTION OF ACTS, &c., 15.

STATUTE OF FRAUDS.

See *EVIDENCE*, 17.

SPECIFIC EXECUTION, &c., 6.

TAXES.

See *CONSTRUCTION OF ACTS, &c.*, 9, 10, 11.

TENANT IN COMMON.

See *TROVER*, 8.

TERMOR.

See *TROVER*, 3, 4, 5, 8.

TORT.

See ASSUMPSIT, 2.

TRESPASS.

See TROVER, 3, 6, 7.

TROVER.

1. The defendant in an action of trover, cannot prove that the title to the property in dispute was not in the plaintiff, but was at the time of the conversion outstanding in a third party, with whom defendant had no connection or privity, either to defeat the action or in mitigation of damages. *Harker vs. Dement*, 8.
2. A defendant in trover cannot set up property in a third person, without showing some title, claim or interest in himself, derived from such person. *Ib.*
3. In an action of trespass or trover by a termor against his reversioner, for an unauthorised interruption of his possession during the term, the measure of damages is the actual loss sustained by the lessee. *Ib.*
4. But in such an action against a stranger and wrong doer, the termor is treated as the absolute owner of the property, and he is entitled to recover its full value. *Ib.*
5. The termor being bound to restore the property to the person from whom he obtained it, or to stand responsible in damages for its full value, has the right to recover its full value from a stranger, who has wrongfully deprived him of it. *Ib.*
6. Upon the ground of ulterior responsibility, the borrower of a chattel may maintain an action of trespass or trover against a wrong doer, who has violated his possession, and recover the full value of the property of which he was dispossessed. *Ib.*
7. A pawnee of goods may maintain trespass against a stranger, who takes them away and recover their whole value in damages, though they were pledged to him for less, because he is answerable for the excess to the owner. *Ib.*
8. There is no analogy between the case of a termor suing for property wrongfully taken from his possession, and that of a tenant in common, or part owner of a chattel suing for his proportionate share or interest. The latter, unless a plea in abatement is interposed, may recover in trover or trespass his aliquot share, but he is under no ulterior responsibility to his co-tenant. *Ib.*
9. Conversion is the wrongful asportation of a chattel with the intent to appropriate it to the taker's use, and when such asportation and intent are proved, the conversion is established, no matter under what impression the taker may have acted. *Ib.*
10. The motive by which a defendant was influenced in converting to his own use the property of another, is only admissible when introduced to repel an attempt by the plaintiff to recover from him, in an action of trover, exemplary damages. *Ib.*
11. If a defendant in trover or trespass fails to plead in abatement to the

TROVER.—Continued.

- suit of one tenant in common, to recover his interest in the chattel, he is precluded from interposing such a plea to a second suit, by another such tenant for his share. *Ib.*
12. The establishment of the fact, that the defendant thought himself the *bona fide* purchaser of the slaves, and under this belief acted in good faith in seizing and taking them from the plaintiff, would not impose upon the latter the necessity of proving a demand and refusal. *Ib.*
13. The acts of Assembly of this State authorise the maintenance of an action of *trover* against administrators for an alleged conversion by their intestate. *Brummett vs. Golden's Adm's*, 95.

See LIMITATIONS OF ACTIONS, 4.

TRUSTEES.

See SALES BY.

TRUSTEE IN INSOLVENCY.

See EVIDENCE, 19, 20, 26.

JURISDICTION, 6, 9.

INSOLVENT DEBTOR, 1, 2, 3, 5.

UNCERTAINTY.

See DESCRIPTION OF LAND, 1.

UNDUE PREFERENCE.

See INSOLVENT DEBTOR, 5.

USURY.

1. It is no defence that the debt for which the note was pledged as security was tainted with usury; the makers of the note cannot, for this reason, avoid the contract. *Gwynn & Co. vs. Lee, et al.*, 137.
2. Before the act of 1845, chap. 352, if the debtor or any person who had a right to represent him, asked in chancery to be relieved from the payment of any usurious debt, the principal and legal interest must be paid. *Ib.*
3. This act will not permit any person to avoid the contract in any suit whether in law or in equity; the principal and legal interest are still due and to be paid, and the creditor is entitled to all the securities which he has, just as if, by the original terms of the contract, it had been to pay the principal, with legal interest. *Ib.*
4. The act of 1845, cannot be regarded as violating the obligation of any contract, so far as it operates upon the contract of loan, it upholds and sustains it in part. *Baughner et al., vs. Nelson*, 299.
5. Under the act of 1704, a party could in equity obtain relief against an usurious contract only by paying or offering to pay the principal sum with legal interest. *Ib.*
6. Neither could the borrower maintain an action of *trover* at law, under this act of 1704, to recover goods hypothecated to secure an usurious debt, unless he tendered the amount actually loaned. *Ib.*
7. If a borrower has paid money on an usurious contract, neither law nor equity will enable him to recover more than the excess paid beyond the principal and lawful interest. *Ib.*

USURY.—Continued.

8. The borrower is at all times and under all circumstances under a moral obligation to pay, or tender, the sum actually loaned, with legal interest, as a fair compensation for its use. *Ib.*
9. The act of 1815, only compels the borrower, who, as a *defendant*, seeks to protect himself against a usurious contract, to do precisely what he was before obliged to do when he stood in the position of *plaintiff*. *Ib.*
10. A borrower can have no *right* as a matter of private justice, to repudiate his contract, so as to escape from the payment of the sum actually received. *Ib.*
11. The act of 1845, chap. 352, is free from objection, and is to be enforced as a valid exercise of legislative power. *Ib.*

VENDOR, VENDEE.

See COURT OF CHANCERY, 13, 14, 15.

VENDOR'S LIEN.

See COURT OF CHANCERY, 13.

VESTED RIGHTS.

See CONSTITUTIONAL LAW, 8, 12.

WARRANTY.

See FRAUD, 1.

COVENANT, 4.

WILL AND TESTAMENT.

1. In order to make a paper the last will and testament of a deceased person at the time it is written, it must appear that such person possessed the *animus testandi* at that time. *Booster vs. Rogers*, 44.
2. A paper, though not a last will and testament at the time it is written, may be made such afterwards by adoption. *Ib.*
3. A paper, though intended merely as instructions or a memorandum, to enable the scrivener to prepare the will, will be admitted to probate, if the more formal will be left unfinished by reason of any act which the law pronounces to be the act of God. *Ib.*
4. There must, however, be a continuance of the intention of the deceased, down to the time when the act of God intervened and prevented the execution of the formal instrument. *Ib.*
5. An immediate or sudden death is not required, if according to the proof, the jury are satisfied that there was no change of intention in regard to the provisions of the will. *Ib.*
6. Where two clauses in a will operate upon on the same property, giving it to different devisees, the subsequent clause operates as an abrogation of the former, and the devisee, under such subsequent clause, takes the whole. *Hollins vs. Coonan*, 62.
7. A testatrix desired all her negroes to be liberated, and declares that they are, "by this my will, liberated and set free in the manner and form following:" She then enumerates three who are to be free at her death, and then proceeds, "my negro woman Beck, and my negro

WILL, &c.—Continued.

man *Basil*, to be free at the expiration of four years from the date of my decease," and then enumerates others who were to be free with their increase at the age of twenty-five years. **Held:** that the issue of *Beck* have no claim to freedom under this will. *Anderson vs. Garrett*, 120.

8. A testator bequeathed certain negroes to his son, "to be paid to him after the natural life of my wife, *Eleanor*, and myself, at which death may last happen. But in case my said son shall die *without lawful issue, and before he possesses said negroes*, in case thereof, my will and desire is, that the whole of them shall go to my daughter," and in case his "daughter should die as aforesaid," then to his second daughter, and so down to the youngest child. The son died without issue in the lifetime of the testator. **Held:** That the limitation over to the daughter, is good as an executory devise. *Edelen vs. Middleton*, 161.
9. The fact that the thing devised is personal property, does not, *per se*, make a general failure of issue, after which it is limited over, mean a definite failure of issue. *Ib.*
10. A different rule prevails in the interpretation of the same words as to limitations over after a failure of issue, in a will disposing of realty, and a will disposing of personalty, but such a discrimination is never made where there is no expression or circumstance in the will which the court can lay hold of as evidence of some intention in the testator, that it should be a definite failure of issue. *Ib.*
11. The cases of *Dallam vs. Dallam*, 7 H. & J., 240. *Newton vs. Griffith*, 1 H. & G., 111, and *Briscoe vs. Briscoe*, 6 G. & J., 232, as to this point examined and explained. *Ib.*
12. In this case, the words "and before he possesses said negroes," are so connected with the proceeding, as to show that the testator meant a definite failure of issue, a dying without issue before the right to possess the property devised should accrue. *Ib.*
13. The widow of the testator possessed a life estate in the negroes, and the remaining interest after the death of the son without issue, passed to the daughter as a vested remainder, and upon her death, leaving issue then living, such vested remainder, became the property of her surviving husband; the surviving husband of the deceased child and only issue of the daughter, has no claim whatever to the property. *Ib.*
14. The words, "failure of issue," were not designed to give to such issue any interest in the property bequeathed, but were merely used as descriptive of the event, upon the happening of which, the otherwise absolute title of the legatee was to be defeated. *Ib.*
15. The rule that a devise of land without words of perpetuity or inheritance, with a limitation over on a dying without issue, enlarges the estate of the devisee from a life estate to an estate tail, has no application to such bequests of personal property. *Ib.*
16. In bequests of personal estate without words of perpetuity, the leg-

WILL, &c.—Continued.

atee does not take a mere life estate which can be enlarged by subsequent limitation, but an absolute estate which is incapable of enlargement. *Ib.*

17. The reason why such a limitation over of land is equivalent to an express devise, is, because if there should be issue at the death of the devisee, the limitation over could not take effect until such issue became extinct, and if the issue were not in such a case to take, there is nobody who could under the will. *Ib.*

18. A testator directed his executors to sell certain real estate, and as soon as the proceeds were collected, to divide the same into eight equal parts, and "to hold one share in their hands for the separate use and maintainance of the testator's daughter and her children, or to invest the same in lands to be settled in trust on his said daughter and her heirs forever, for the sole use and maintainance and support of her and her children, without the control of her husband, as to his executors should seem most expedient." The acting executor sold a part of the land and retained the proceeds in his hands, not being able, as he alleged, to invest it in lands. **Held:** That the testator designed that the principal of the sum devised to his daughter, should not be diminished; that the interest alone should be applied to her maintainance and that of her children, and that the executor was bound to pay interest on the sum so retained by him. *Worthington's Exc'r vs. Owings*, 196.

19. A testator by his will, executed in 1788, devised as follows: "I give and bequeath to my son *I. D.*, the use of the plantation whereon I now live, to him, the said *I. D.*, during his natural life, and if it should please God that the said *I. D.* should have issue born of his body lawfully begotten, then such issue after the death of the said *I. D.*, to have the aforesaid devised premises in fee tail, but if the said *I. D.* should die without issue of his body lawfully begotten," then over to his son *T. D.*, in fee simple. **Held:** That under this devise, *I. D.* took only a life estate, and not an estate tail general, and that the rule in *Shelley's case* does not apply. *Chelton vs. Henderson's Lessee*, 432.¹

20. This rule is not an imperious rule of law which must control the operation of a will, no matter how clearly a contrary intention may be expressed upon its face, but it is a rule of construction that must prevail, except in cases where a contrary intention satisfactorily appears by the will itself. *Ib.*

21. It was established in *England* as a convenient and necessary rule of construction, by which the intention of the testator was to be effectuated, not defeated. *Ib.*

22. Even if in such a case in *England*, the technical import of the word "heirs" should be regarded as conclusive evidence of the intent of the testator, that the rule should operate and countervail all other expressions in the will indicating a contrary intent, yet it does not follow that the same principle must govern a case, where the word "heirs," is not used. *Ib.*

WILL, &c.—Continued.

23. The word "issue," is a term of equivocal import, being either a word of limitation or of purchase, according to the intent of the testator, deduced from the expressions contained in the will. *Ib.*
24. In *England*, every inference is in favor of the rights of primogeniture, and all presumptions are in favor of the acquisition of title to land. by descent rather than by purchase. *Ib.*
25. In *England*, the word "issue," when used in a will, is construed a word of limitation and not of purchase, unless the intent of the testator to use it as a word of purchase, is so conclusively shown by other expressions, as to repel such an interpretation. *Ib.*
26. In this State, since the act of 1786, no partialities or presumptions in favor of primogeniture or heirs at law, can, as applicable to a case like the present, be said to exist. *Ib.*
27. The right of testamentary disposition, where the intent of the testator satisfactorily appears, is to be favored and fully effectuated, unless in contravention of some established principle of law, over which the intent of the testator can exert no control. *Ib.*
28. Courts of justice will be astute in discovering the real intent of the testator, and the means by which that intent is to be carried into effect. *Ib.*
29. The act of 1786, ch. 45, abolished the right of primogeniture, and made all estates tail general thereafter acquired, to descend as fee-simple estates, and by the act of 1782, ch. 23, an estate in fee-tail may be conveyed in the same manner as an estate in fee-simple. *Ib.*
30. The clear intent of the testator in this will, was that his son, *I. D*, should enjoy the plantation during his life, and if he should have "issue," such "issue," after his death, should have the land in fee-tail. *Ib.*
31. The rule in *Shelley's case*, has, in this State, in a case like this, no principle of reason, expediency or policy to sustain it, and it would wholly defeat the clearly expressed intent of the testator. *Ib.*
32. This court cannot assent to the doctrine that the rule in *Shelley's case*, must be applied without reference to testamentary intention, as applying to cases since the act of 1786, ch. 45. That rule is not applicable to a case like this. *Ib.*
33. In construing wills since the passage of the act of 1782 and 1786, we must look not merely to the law as it prevails in *England*, but to its altered condition in this State, since the passage of those acts. *Ib.*

See REVOCATION OF WILLS, &c.

ORPHANS COURT.

NUNCUPATIVE WILLS.

WITNESS.

See EVIDENCE, 4, 5.

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